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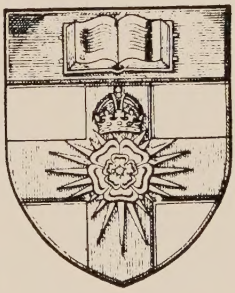

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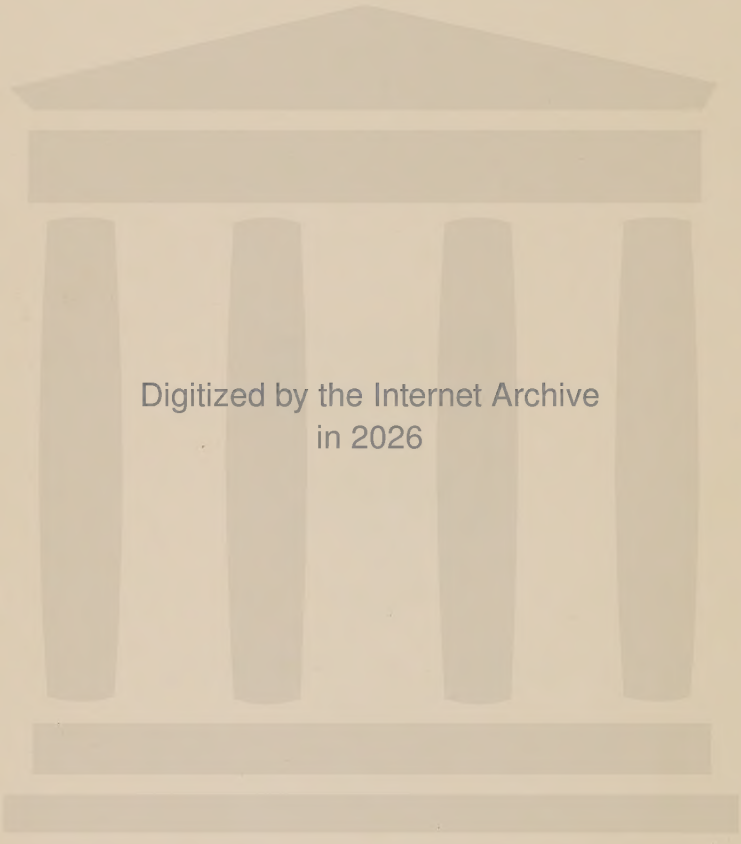
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THE

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HOUSE OF LORDS,

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1923.

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MEMORANDA.

1923.

Mar. 22. The Hon. Sir Reginald More Bray, *late a Justice of the King's Bench Division of the High Court of Justice, died at his residence,* 17, *The Boltons, London, aged* 80.

Aug. 17. The Right Hon. William Lord Sterndale, *Master of the Rolls, died very suddenly at King Sterndale, near Buxton, aged* 74.

Oct. 11. The Right Hon. Lord Coleridge *resigned his office as one of the Justices of His Majesty's High Court of Justice, King's Bench Division.*

Oct. 12. The Right Hon. Sir Robert Younger, G.B.E., *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Acts,* 1876 *and* 1913, *and was granted the dignity of a Baron for life by the style and title of Baron Blanesburgh of Alloa, in the County of Clackmannan.*

Oct. 12. The Hon. Mr. Justice Sankey *was nominated to be ex-officio Commissioner for England under the Railway and Canal Traffic Act,* 1888.

Oct. 15. The Right Hon. Sir Ernest Murray Pollock, Baronet, K.B.E., K.C., *was appointed to be Keeper or Master of the Rolls and Records of the Chancery of England.*

Oct. 15. The Hon. Sir Charles Henry Sargant, *one of the Justices of His Majesty's High Court of Justice, was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Sir Robert Younger, G.B.E.*

Oct. 15. Thomas James Chesshyre Tomlin, Esquire, K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Hon. Mr. Justice Sargant, and was afterwards Knighted.*

Oct. 29. The Hon. Mr. Justice Tomlin *was appointed to be Chairman of the Royal Commission on Awards to Inventors.*

Nov. 2. Sir Frederick Albert Bosanquet, K.C., *late Common Serjeant of London, and formerly Chairman of the Incorporated Council of Law Reporting for England and Wales, died at his residence,* 12, *Grenville Place, London, in his* 87*th year.*

Nov. 14. George John Talbot, Esquire, K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice in the place of the Right Hon. Mr. Justice Darling, resigned.*

Nov. 21. The Right Hon. Sir Ernest Murray Pollock, Baronet, K.B.E., *Master of the Rolls, was appointed to be Chairman of the Royal Commission on Historical Manuscripts.*

Nov. 28. The Hon. Sir Charles Henry Sargant, *Lord Justice of Appeal, was, by his Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Nov. 30. The Right Hon. Earl Loreburn, *formerly Lord High Chancellor, died at his residence, Kingsdown House, Deal, in his* 78*th year.*

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)*

1922

Nov. 3.

RUTHERFORD . . . . . APPELLANT;

AND

RICHARDSON . . . . . RESPONDENT.

Divorce—Wife's petition—Allegation of Adultery of Husband with Intervener—Finding of such Adultery by Trial Judge—Suit not defended by Husband—Decree Nisi—Appeal by Intervener—Reversal of finding as to Adultery—Rescinding Decree Nisi and substituting Decree of Judicial Separation.

A wife petitioned for the dissolution of her marriage with the respondent, on the ground of cruelty and adultery with the intervener. The respondent did not defend the suit. The trial judge found both the cruelty and adultery proved and granted a decree nisi. Upon an appeal by the intervener, the Court of Appeal found that the petitioner had failed to establish that adultery had been committed between the respondent and the intervener and, after hearing the King's Proctor as to the legal effect of that finding, rescinded the decree nisi and substituted a decree for judicial separation. Upon an appeal by the petitioner to

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* *Present:* VISCOUNT BIRKENHEAD, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

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the House of Lords, their Lordships having by a majority (Viscount Birkenhead, Lord Dunedin, Lord Atkinson and Lord Sumner; Lord Wrenbury and Lord Carson dissenting) affirmed the finding of the Court of Appeal:—

Held (Lord Wrenbury dissenting), that upon this finding it was the duty of the Court of Appeal and of the House of Lords to rescind the decree nisi and to pronounce the decree of judicial separation which the trial judge, if he had determined the issue of adultery differently, might have pronounced.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal rescinding a decree nisi for dissolution of marriage granted by Branson J. on the wife's petition and substituting a decree for judicial separation.

On August 4, 1920, the appellant Mrs. Alice Rutherford presented a petition in the Probate, Admiralty and Divorce Division for the dissolution of her marriage with her husband Colonel Norman Rutherford on the ground of his cruelty and of his adultery with Miss Amy Richardson, the respondent in the appeal.

At the date of the petition Colonel Rutherford was confined in the Broadmoor Criminal Lunatic Asylum. In January, 1919, he shot and killed Major Seton, his wife's cousin, and in April he was indicted for murder and was found guilty but insane.

The petition was served upon him and he entered an appearance, but he did not defend the suit.

Miss Richardson obtained leave to intervene and by her answer she denied the adultery and asked that the petition should be dismissed so far as it was based upon the allegations of adultery.

The only act of adultery alleged was on one night in August or September, 1916, at Frith Manor, Mill Hill, where Colonel Rutherford was living with his wife and family, except when he was on active duty in France. Miss Richardson, who was Colonel Rutherford's cousin, had been living in the house for the previous two years as companion to Mrs. Rutherford.

It was admitted that Colonel Rutherford entered Miss Richardson's bedroom between 10 and 11 o'clock on the

night in question after Miss Richardson was in bed with the intention of committing adultery with her, and that they had a conversation, but Miss Richardson stated in evidence that she indignantly repelled his overtures and gave him a cousinly scolding; that she told him to go away, which he did; and that he was in her room for a few minutes only.

Colonel Rutherford in his conversations with third parties admitted that he had entered Miss Richardson's bedroom and, according to the account of one witness, admitted that he had been in bed with her, but he denied that there had been any intercourse between them. Miss Richardson at first refused to be medically examined, but in the course of the trial she submitted herself for examination by her medical attendant and the result of the medical examination was such that it was very improbable that any sexual intercourse had occurred.

Branson J. found both the cruelty and the adultery proved and granted a decree nisi.

Miss Richardson appealed to the Court of Appeal. On November 30, 1921, the Court of Appeal (Lord Sterndale M.R., Warrington and Atkin L.JJ.) reversed the finding of Branson J. as to adultery and found that the petitioner had failed to establish that adultery had been committed between Colonel Rutherford and Miss Richardson, and the Court directed that the King's Proctor should argue the question whether the decree nisi should be deemed valid notwithstanding the finding of the Court of Appeal. On February 13, 1922, the Court, after hearing the King's Proctor, ordered that the appeal should be allowed and that the intervener should be dismissed from the suit with costs above and below; that the decree nisi should be rescinded; and that a decree of judicial separation should be granted as between the petitioner and her husband.

The arguments on this appeal are reported only on the question of law argued by the King's Proctor.

1922. July 20, 21, 24. *Sir John Simon K.C.* and *Bayford K.C.* (with them *Cotes Preedy* and *Bush James*) for the

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appellant. The result of the decision of the Court of Appeal is that the appellant, although she had an overwhelming case against her husband, has lost her decree against him notwithstanding that he never appealed against it. It does not follow that the decree nisi necessarily goes by reason of the judgment of the Court of Appeal on the facts. The fact that the case is not proved against the intervener does not disentitle the appellant to a decree. If Miss Richardson had not intervened there was abundant evidence to support a decree against the husband, and the inclusion of her evidence at the most shows that the case is not proved against her without destroying the case against the husband. It sometimes happens upon a husband's petition—and the same principle applies to a petition by the wife—that a confession by the respondent that she has committed adultery with A. B. affords a ground for a decree nisi, although A. B. may be dismissed from the suit, because the Court may properly come to the conclusion that the confession is trustworthy, although it is not evidence against the co-respondent: *Robinson* v. *Robinson* (1); *Collins* v. *Collins*. (2) There is no inconsistency in that view. If, however, the true effect of the judgment of the Court of Appeal upon the facts is not that the case was not proved against Miss Richardson, but that the Court was prepared to assert affirmatively that no adultery had been committed, then no doubt the decree nisi ought not to stand; but that is not this case.

Cartwright Sharp and *C. B. Guthrie* for the respondent (the intervener). The Court of Appeal having reversed the finding of the trial judge as to adultery, it must have power to make the same order as the trial judge would have made if he had come to the same conclusion on the facts as the Court of Appeal.

[Counsel also contended that, in so far as the Court of Appeal ordered that the intervener should be dismissed from the suit, this, having regard to s. 9 of the Judicature Act, 1881, was not a question proper to be discussed in this

(1) (1858–9) 1 Sw. & Tr. 362. (2) (1916) 115 L. T. 936.

House, but eventually they abandoned this contention. They referred to *Allen* v. *Allen*. (1)]

Sir John Simon K.C. replied.

The House took time for consideration.

1922. Nov. 3. VISCOUNT BIRKENHEAD. My Lords, this case is by no means free from difficulty, but I have myself formed a clear view upon it. I find it convenient to examine in the first place the various legal difficulties which have been the subject of argument at the Bar, and then to address myself to the facts which, after such examination, appear to be relevant and important.

It is, of course, a commonplace that the decision of legal issues must depend on rigid rules of evidence, necessarily general in their scope and very likely, therefore, in individual applications, to present an appearance of artificiality and even of inconsistency. But there must be a general code, for otherwise the admission or rejection of evidence would depend upon the caprice of an individual judge; "Quot judices tot sententiæ." And it is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule. Such an injustice may occasionally occur, for it is almost a commonplace that a sensible and experienced citizen, in the course of reaching a decision as to whether a certain thing has or has not happened, will allow his judgment to be influenced by evidence which would not be accepted in the Courts. Indeed, I have no doubt that judges of the highest eminence reach conclusions in their own private and domestic affairs by reference to a standard more relaxed than the Courts allow. But this is not the point —or, at least, it is not the whole point. The issues pronounced upon by Courts in criminal, and, indeed, in civil matters, are attended with such decisive consequences that the adoption in matters of evidence of a standard of admissibility which is so cautious as to be meticulous may not only be defended but is, in fact, essential.

(1) [1894] P. 248, 252.

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Applying these considerations to the kind of difficulty which has often presented itself in the Divorce Court, we find that a case which has sometimes been ignorantly derided is, in fact, both logical and defensible; for instance: A. a husband brings against his wife B. a petition for divorce, on the ground of her adultery with a named co-respondent C. There is some independent evidence against both B. and C., but not sufficient to justify a positive adverse conclusion. B., however, makes full confession. Here the Court may very reasonably pronounce a decree against B., while concluding that the matter is not established as against C. Indeed, to hold otherwise would be to lay it down that the admission or confession of B.—which may be quite untrue, and which may be induced by hidden and private motives—is to be treated as good evidence against C. And so it happens that the Court may quite reasonably conclude that it is proved that B. has committed adultery with C., but not that C. has committed adultery with B. The law of England does not technically recognize a verdict of "not proven," but substantially this is the nature of the verdict which in the circumstances supposed exculpates C.

But still another case requires consideration. Supposing that the case presented and the impression made by C. upon the Court is of such a character that the judge, summarising his impression, may record it in this way: "Not only has C. convinced me that I must give him the benefit of the doubt, because the admissions are not evidence as against him, but he has positively satisfied me that no adultery was ever committed at all between the parties charged."

Such a conclusion, if plainly reached by a judge or a jury, makes it impossible for any purpose whatever to act upon the admissions which would otherwise have been a reliable guide in relation to him or her who made them. For in the case supposed, that which has been proved by C. is, as my noble and learned friend, Lord Dunedin, suggested in the course of the argument, absolutely destructive of the case made by B. and, therefore (inter alia), of the admissions upon which and upon which alone that case depended.

These observations apply equally to the converse case where A. is the wife petitioning for divorce, B. being the husband the respondent, and C. the intervener. But here, owing to the fact that adultery is not the only issue, a fresh question of law arises.

Assume, as before, that in spite of B.'s admissions, a conclusion is reached which, so far as adultery is concerned, is destructive of the case against B. But assume also an issue of cruelty raised by A., admitted by B., and determined in favour of A. Here the proper order is a decree of judicial separation, and no one doubts the power of a judge on this hypothesis to make such a decree in the respondent's absence. Next suppose that the judge has pronounced a decree of dissolution of marriage, and that the Court of Appeal, on a rehearing, finds that the adultery on which the decree was based never took place. It has been urged in the present case that on that hypothesis the Court of Appeal has no power to decree judicial separation. But what is the difference ?

The Court of Appeal has before it a petition founded on adultery and cruelty in which the case for adultery has been destroyed, and the case for cruelty has been proved and still stands. In my view it is open to the Court of Appeal to pronounce the decree of judicial separation which the judge, if he had determined the other issue differently, might have pronounced in the first instance. By not defending either issue, B. had put it out of his power to prevent the judge from making a decree of judicial separation in his absence. How can B. reasonably complain if, also in his absence, the same decree is made by the Court of Appeal ?

The foundation of these rules is the fact that marriage is more than a simple contract between spouses, or a thing which they can dissolve by their own acts and choice, even consensually. It is a status, involving other and more important interests, and the statutory power of dissolving it depends in this case on the Court's being satisfied that adultery in fact took place. A Court, not satisfied of that fact irrespective of the persons concerned in admitting or

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denying it, ought not to pronounce a decree which can only be pronounced on the footing that adultery has occurred. Similarly, when a Court of Appeal decides that a decree of dissolution, duly brought before it for review, ought not to have been pronounced, its duty must be to pronounce the right decree in the whole matrimonial cause, and not merely to limit its conclusion to the issue raised between the parties who have been served with notice of the appeal or have chosen to appear before it. Otherwise the result would be that, by the voluntary act of a party in regard to the conduct of legal proceedings, a competent Court might allow a marriage to be dissolved on the footing that adultery had occurred, while declaring that no such adultery had really taken place. If this is to be the law, it is for the Legislature to enact it, for Courts are interpreters of the law and cannot so conclude.

A further point of law has been raised whether by reason of s. 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), the decision of the Court of Appeal is final, in which case the present appeal does not lie, or whether the case falls within the exception, as being an appeal from a decision on a petition for dissolution of marriage. The appeal is from the order of the Court of Appeal, and that order is the decision refusing a decree on a petition for dissolution of marriage. In my opinion the case falls clearly within the exception, so that your Lordships have jurisdiction to deal with the case.

Such being, in my judgment, the law applicable to the case, I turn to consider the facts.

The story is in its main lines simple and short. So far as the petition is founded upon cruelty, the charge is made out without any possibility of doubt. So far as it is based upon adultery, it depends upon one isolated act, charged in the petition as having been committed by the respondent with Amy Richardson, "about the end of August or the beginning of September, 1916, at Frith Manor, Mill Hill, in the County of Middlesex."

There is no doubt that, upon the day, or rather upon the

night on which it is alleged that adultery took place, the respondent visited the room of the intervener with the intention of committing adultery with her. It is alleged by the intervener that no act of adultery took place on that or any other occasion, and there is no evidence against the intervener on this point except statements which she is alleged to have made to certain persons, both before and after the visit to her room. There is, or it is suggested that there is, evidence against the respondent of such an act on that occasion, based upon his admissions to third parties. This evidence is not available against the intervener, but, as the admissions formed an integral part of the narrative, I shall set them out also.

In August, 1916, the petitioner, Mrs. Rutherford, was residing at Frith Manor. The inmates of the house were the six children of her marriage with the respondent, Miss Richardson, a cousin of the respondent, who occupied the position of companion and mother's help, and one Winifred Louth, the parlour-maid.

Colonel Rutherford was an officer in the Royal Army Medical Corps, and in August and September, 1916, was at home on sick leave, suffering from some affection of the skin. The marriage between the petitioner and the respondent had taken place in 1902. It was an unhappy marriage. The respondent was a man of uncontrolled temper, which manifested itself in violent language and in violent acts. His attitude towards sexual questions may be inferred, partly from the fact that he was, as it is alleged, in the habit of molesting the female servants in the house, and partly from the fact, already stated, that upon the critical evening he, while his wife lay ill upstairs, visited the room of his cousin, who was living in the house as a dependent, with a view to having sexual connection with her.

Yet the relations between Colonel Rutherford and his wife were not at this time wholly hostile. She appears to have been ready to forgive, and to have forgiven, both his temper and his habits, and, at this time and for some years afterwards, to have retained sufficient affection for him to be

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willing to live with him as man and wife. He, on his side, in spite of these outbreaks, appears to have been attached to Mrs. Rutherford, or, at least, passionately jealous of her.

In considering the narrative which is to follow, close attention must be given to the material dates. The alleged act of adultery took place in August or September, 1916. On January 13, 1919, Colonel Rutherford shot and killed Major Seton, his wife's cousin. He was tried in April of that year upon the charge of murder, was found guilty, but insane, and is now an inmate of Broadmoor Criminal Lunatic Asylum. The petition for divorce was lodged on August 4, 1920. The hearing of the case began on June 9, 1921 (one witness, whose attendance was impossible, having been examined on commission on the previous day), and was concluded on June 14. These dates are material for two reasons. In the first place it is not wonderful that when the witnesses gave evidence before Branson J. discrepancies should appear in their detailed narrative of conversations which had taken place some five, and some four, years before they repeated them in Court. In the second place, the date of the filing of the petition illustrates the belief entertained by the petitioner in the intervening years. [His Lordship then reviewed the evidence at length and as the result thereof said that their Lordships were led back to consider on but slender material the events of the night of September, 1917, and he continued as follows :] Put quite shortly, the case against Miss Richardson is that on that night she made a guilty assignation with her cousin, that she in pursuance of that assignation committed adultery with him, and that, for no purpose which can be discerned, she informed the parlour-maid of her intention to commit adultery, and, to make assurance doubly sure, informed her the next morning that the adultery had been happily consummated.

I should not believe this story, in the face of Miss Richardson's denial, even if it stood alone. All the external circumstances seem to me either to support her story, or so to have filtered through the minds and mouths of those by whom they were repeated, that they might naturally

be expected to acquire, and that they have in fact acquired exaggeration and deflection.

There remains the medical evidence. In the course of the trial, Miss Richardson, although she had refused to be examined beforehand, submitted herself for examination to a medical man employed by her. The Court of Appeal rested mainly upon that evidence to reach the conclusion that the decree should be set aside. I assign less importance to it, and regard it only as affording further corroboration of the other considerations in favour of the intervener. The evidence of the doctor was cautious and guarded. It seems, however, to establish that there had been no penetration and, in the doctor's opinion, that the appearance of the organs was such as he did not think was consistent with an effective attempt at penetration. Some suggestion was made in argument in this House that this condition, even though inconsistent with penetration, was not inconsistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the Ecclesiastical Courts, a decree based upon adultery might issue. But it is not open now to the petitioner to rely on some lesser sexual act. No evidence was adduced in support of such a suggestion. It was not made to the intervener or to the doctor, and I do not think that counsel at the Bar of this House put it forward very seriously.

The medical conditions then, if considered alone, render it most unlikely that any sexual connection took place. I have already disposed of the evidence other than medical. The sum of the whole seems to me clearly to establish Miss Richardson's innocence of the charge. I use this expression with deliberation. The English law, admitting no verdict of "Not proven," may leave the respondent and the co-respondent or intervener in the unfortunate position that the Court has discharged them from the proceedings, while leaving him or her under the implication that they have escaped only through lack of sufficient evidence. This, in my view, is not the case here. I think that the

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evidence is such as wholly to acquit Miss Richardson of any guilt.

It is evident that the arguments which I have addressed to your Lordships will, if effect is given to them, leave Mrs. Rutherford bound in matrimony. It is an unfortunate circumstance that she should thus be tied for life to a dangerous, violent and homicidal lunatic, after having for many years suffered, both in body and in spirit, from his unfaithfulness and his cruelty. He is forty-one years of age and she is forty. We need take little account of his feelings. As regards her, we are bound to note that during many more years, unless death remove him or release her, she must look forward to a loneliness from which she can escape only by a violation of the moral law. To some this may appear a harsh, and even an inhumane result; but such, my Lords, such is the law of England. Your Lordships cannot, because of the sympathy which you must all feel for this unhappy victim of our marriage law, impeach the chastity of a woman, equally innocent, who also is entitled to the sympathy and shelter of the law. The true remedy lies outside any Court of law; it lies beyond the scope of your Lordships' faculties, sitting as the Supreme Appellate Tribunal. It rests with Parliament (if and when it thinks proper) to end a state of things which in a civilized community, and in the name of morality, imposes such an intolerable hardship upon innocent men and women.

For the reasons which I have given I am of opinion that the appeal fails, and I so move your Lordships.

LORD DUNEDIN. My Lords, as regards the law of this case I cannot say I ever had any doubt; in other words, taking the view they did of the facts I think the Court of Appeal were entitled to pronounce, and did pronounce, the right order in the circumstances.

As regards the facts I admit that at the end of the argument I was inclined to think that it would be safer to adhere to the view that was taken by the judge of first instance, but on further consideration, and especially having had the

opportunity of perusing the opinion which has just been delivered by my noble and learned friend on the Woolsack, I have come to the conclusion that my first impression was not right, and I am enabled to concur in the judgment proposed.

LORD ATKINSON. My Lords, I also concur. Before I had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend on the Woolsack, I myself had prepared a judgment in which I endeavoured to analyse the evidence and to form and express a view on the matters of law and fact involved in the case; but, as I now find that I practically concur in all the conclusions at which my noble and learned friend has arrived, I think it is unnecessary for me to occupy the time of the House in reading the judgment I had prepared. I therefore limit myself to concurrence with my noble and learned friend.

LORD SUMNER. My Lords, I also have had the same great advantage and I also concur.

LORD WRENBURY. My Lords, the trial judge, Branson J., upon the wife's petition against the husband (Miss Richardson intervening) granted a decree nisi for divorce and condemned the husband and the intervener in costs. The intervener appealed naming the wife only as respondent. The husband was no party to the appeal. Upon that appeal the Court of Appeal made an order consisting of two parts. They allowed the appeal, and (1.) dismissed the intervener from the suit with costs and (2.) rescinded the decree nisi and made a decree for judicial separation. From this order the wife appeals to this House. The husband having been no party to the order in the Court of Appeal is again of course no party to the present appeal. I must deal separately with the two points in the order of the Court of Appeal.

As regards the former the wife has argued in support of the order made by the trial judge against the intervener,

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and has asked that the order of the trial judge be restored. The majority of your Lordships are of opinion that the wife fails upon this point and have given reasons for holding that the accusation against the intervener of adultery with the husband is not made out. I cannot myself concur in this opinion. I think that the order of the trial judge ought to be restored. But I do not go on to give the grounds for my opinion, and for this reason—namely, that inasmuch as the majority of your Lordships acquit the intervener in the matter, it could serve no useful purpose to marshal facts to show the contrary, and it would be I think an unnecessary hardship upon the intervener for me to do so.

As regards the question of jurisdiction of this House, having regard to s. 9 of the Judicature Act, 1881, to entertain an appeal upon a matter in dispute between the petitioner and the intervener, inasmuch as the result so far will be to dismiss the appeal, the question of jurisdiction to entertain it does not arise, and I say nothing about it.

As regards the latter question it seems to me that upon an appeal by the intervener to the Court of Appeal to which the husband was not a party, the order nisi, which was one between husband and wife only, could not be varied or altered in any way. It is impossible, I think, that that order should be discharged at the instance of a party who is not affected by it and in the absence of a party who is. The intervener had no concern with that part of the order which consisted of the order nisi. Marriage is a contract; that contract is by statute capable of being determined. But a contract between A. and B. cannot be determined or affected at the instance of C. and in the absence of A. Upon the appeal of the intervener and in the absence of the husband the Court of Appeal had, I think, no jurisdiction to rescind the order nisi or to substitute an order for judicial separation. This part of the order under appeal ought, I think, to be reversed.

If and when application is made for order absolute the Court may have to regard considerations which seem to me at present irrelevant.

LORD CARSON. My Lords, I am of opinion that there was ample evidence given before Branson J. to support the conclusion at which he arrived, if he believed such evidence. He had the advantage of seeing the witnesses and hearing their examination and cross-examination, and was therefore in a much better position to judge of their credibility than we are; an observation which applies with special force in such a case as the present. Personally I see no reason for dissenting from the opinion he formed.

My noble and learned friend, Lord Wrenbury, has stated that inasmuch as the majority of your Lordships acquit the intervener in the matter, it could serve no useful purpose to marshal facts to show the contrary, and that it would be an unnecessary hardship upon the intervener to do so.

My Lords, I am prepared to fall in with this view and for the reasons he has stated, and I certainly have no desire to detract from the acquittal the intervener has obtained. As the majority of your Lordships have come to the conclusion that no adultery was committed, no necessity arises for considering separately the evidence properly admissible against the husband and the intervener respectively, and upon such a conclusion being arrived at I think it was the duty of the Court of Appeal and is the duty of this House to rescind the decree nisi, having regard to the terms of ss. 29 and 30 of the Divorce and Matrimonial Causes Amendment Act of 1857 (20 & 21 Vict. c. 85).

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 3, 1922.

Solicitors for the appellant: *Withers, Bensons, Currie, Williams & Co.*

Solicitors for the respondent (the intervener): *Turner & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)* KERR AND OTHERS . . . . . APPELLANTS;

1922

Nov. 3. AND

BRYDE . . . . . RESPONDENT.

Landlord and Tenant—Rent Restriction—Necessity for Removal Notice as Condition Precedent to Increase of Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 3, *sub-s.* 1.

By virtue of s. 3, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is a condition precedent to the right of a landlord to a permitted increase of rent under the Act that he should have terminated the tenancy by serving on the tenant, in Scotland, a notice of removal, and, in England, a notice to quit, in cases where a notice to quit is required for that purpose:—

So *held* by Lord Atkinson, Lord Sumner, and Lord Carson; Lord Dunedin and Lord Wrenbury dissenting.

Newell v. *Crayford Cottage Society* [1922] 1 K. B. 656 approved.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland affirming a decision of the Sheriff of Stirling, Dumbarton and Clackmannan, which affirmed a decision of the Sheriff-Substitute.

The facts, which are fully stated in the judgments of Lord Dunedin and Lord Atkinson, may be thus summarised.

The first-named appellant was the landlord and the respondent was the tenant of a dwelling house at Clydebank. The house was a "small dwelling house" within the House Letting and Rating (Scotland) Act, 1911. It was also a house to which the Increase of Rent, &c. (Restrictions), Act, 1915, applied and to which the Increase of Rent, &c. (Restrictions), Act, 1920, now applied. The house was let on August 28, 1916, for one month at 1*l.* 2*s.* 6*d.* per month, which was the standard rent for the purposes of the Rent Restriction Acts. No notice of removal having been given, the respondent continued in occupation by tacit relocation at the same rent until August, 1920, and he was still in occupation. On

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

July 27, 1920, the landlord by his factors, the remaining appellants, served on the respondent a notice in the form prescribed by the Act of 1920 of his intention to increase the rent by 7*s.* 7*d.* per month as from August 28, 1920, and on April 26, 1921, he served a second notice in statutory form of his intention to increase the rent by a further 10 per cent. of the net rent as from July 14, 1921 (these increases corresponding with increases in the rates), with the result that the rent was raised to 2*l.* 0*s.* 1*d.* per month.

The proposed increases had not been paid by the respondent, who challenged their validity. In November, 1921, the appellants sued the respondent for the balance of the alleged increases over sums paid to account applicable to the months of August, September and October, 1921. No notice of removal was given by the appellants to the respondent under the House Letting and Rating (Scotland) Act, 1911, or otherwise. The respondent's defence was that by virtue of s. 3, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, service of a notice of removal was a condition precedent to the imposition of any increase of rent under the Act.

Sect. 3, sub-s. 1, provides: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession."

The Sheriff-Substitute upheld the respondent's defence and dismissed the action, and his decision was affirmed first by the Sheriff and afterwards by the First Division of the Court of Session (the Lord President, Lord Mackenzie, Lord Skerrington, and Lord Cullen).

1922. July 24, 25, 27. *Moncrieff K.C.* (with him *T. M. Cooper*) (both of the Scottish Bar) for the appellants. The question is whether upon the true construction of s. 3, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920, it is a condition precedent to the landlord's right to increase the rent by virtue of the provisions of the Act that he should first have terminated the tenancy by means of a formal notice of

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removal as required by law. [He referred to the Sheriff Courts (Scotland) Act, 1907, ss. 37, 38, the Agricultural Holdings (Scotland) Act, 1908, s. 18, and the House Letting and Rating (Scotland) Act, 1911, s. 4.] The Courts below, in answering this question in the affirmative, have proceeded on the view that a tenant remains a tenant by consensual renewal even after the period during which the statute has attached. The appellants dispute that proposition. It is the Act which enables the tenant to hold on (see s. 15, sub-s. 1), and what is preserved to the tenant is his interest under his original contract. The object of s. 3, sub-s. 1, was to afford protection to the tenant against any increase of rent for the duration of the term of the current let and to authorize the landlord to increase the rent as soon as that term had expired. Similarly in the case of mortgages the object was to ensure that no increase should be made in the rate of interest until the expiry of the period for which the parties had expressly stipulated that the loan should endure at a specified rate. The decisions of the Courts below rest upon the fallacious assumption that nothing but a valid notice of removal will prevent the inference of tacit relocation, but any act of the parties which is inconsistent with the continuance of the tenancy on the old terms is sufficient to rebut the presumption of tacit relocation. If a landlord says, "I will only continue your tenancy if you will pay me more rent," that is a valid expression of dissent to continue on the same terms and tacit relocation is out of the question; and, if the tenant is unwilling to agree to the new terms, he has notice to quit: *M'Farlane* v. *Mitchell* (1); *Buchanan* v. *Harris & Sheldon* (2); *Sutherland's Trustee* v. *Miller's Trustee* (3); *Morrison* v. *Campbell.* (4) So here the statutory notice demanding an increase of rent under the Act is a notice putting an end to the tenancy if the tenant does not pay the increased rent: *Ahearn* v. *Bellman.* (5) The Act makes detailed provision with regard to the formalities

(1) (1900) 2 F. 901, 904.
(2) (1900) 2 F. 935.
(3) (1888) 16 R. 10.
(4) (1842) 4 D. 1426.
(5) (1879) 4 Ex. D. 201, 211-214.

to be observed in connection with an increase of rent, and if the Legislature had intended to require the useless formality of service of a formal notice of removal it is to be presumed that it would have dealt with this matter specifically. The First Division was influenced by the fact that the construction of the Act for which the respondent contends has been adopted in England in a series of decisions, which are summarised in *Newell* v. *Crayford Cottage Society* (1), but it is possible to decide this case in the appellants' favour without overruling these decisions by reason of the difference which exists between the Scottish and English law of landlord and tenant. In England, in the case of periodic tenancies, the right of the tenant is to enter into and remain in occupation until he receives notice to quit, and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists suo proprio vigore: Foà on Landlord and Tenant, 6th ed., pp. 4 and 5. In Scotland the lease can never confer a right on the tenant to continue in occupation beyond the stipulated period, and his subsequent possession depends on the theory of a constructive renewal by an implied agreement of a lease which has expired. In England therefore the tenant, but for the Act, would have been occupying under his original contract, which was still current, and the English decisions may be supported on that ground. But so far as those decisions depend upon a construction of the Act inconsistent with the appellants' contentions it is submitted that they are erroneous and ought to be overruled. In *Newell's Case* (1) Younger L.J.'s judgment was practically a dissent, but he considered himself bound by authority. [He also referred to *Campbell's Trustees* v. *O'Neill*. (2)]

Morrice Mackay K.C. (with him *Craigie M. Aitcheson*) (both of the Scottish Bar) for the respondent. Six judges in Scotland and eight or nine judges in England have decided that a permitted increase of rent cannot be validly imposed until the contractual tenancy has been determined by service of a notice of removal or a notice to quit. Tacit relocation is so

(1) [1922] 1 K. B. 656. (2) 1911 S. C. 188.

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strongly presumed by law that it always applies in the absence of a warning to remove by the landlord or a renunciation by the tenant at the appropriate time. The presumption arises from the nature of the bargain and is not rebuttable by facts or circumstances: Stair II., ix., 23; Erskine's Institute II., vi., 35; Hunter's Landlord and Tenant, 4th ed., pp. 523–526.

[LORD DUNEDIN referred to Bell's Principles (Guthrie's edition), § 1265.]

Morrison v. *Campbell* (1) and the other cases cited by the appellants on this point are all explicable on the theory of a subsequent agreement and they do not interfere with the law laid down by the institutional writers: see also *Blain* v. *Ferguson*. (2) Apart from the Act the landlord is not entitled to obtain possession until he has given a formal notice to remove, and until that event the tenant retains possession not by virtue of the Act but by tacit relocation. But "entitled to obtain possession" does not mean that the landlord must further have taken proceedings in the Courts. Woodfall's Landlord and Tenant, 20th ed., pp. 956, 958. The statutory tenancy does not set in whenever the current term expires; it only sets in when the landlord has taken the appropriate steps to give him a title to possession. By giving a notice to quit the landlord puts himself in peril of losing the tenant and it is essential for changing the character of the tenancy into a statutory tenancy. It is therefore not an idle formality. It is said that the statutory notice to pay an increased rent operates as a notice to quit, but it cannot have a dual capacity. As regards this let there is no difference in substance between the law of England and the law of Scotland. The respondent is therefore entitled to rely on the English decisions, all of which support his contention: *Peizer* v. *Federman* (3); *Glossop* v. *Ashley* (4); *Remon* v. *City of London Real Property Co.* (5); *Hill* v. *Hasler* (6);

(1) 4 D. 1426.
(2) (1840) 2 D. 546.
(3) (1921) 38 Times L. R. 54.
(4) [1921] 2 K. B. 451.
(5) [1921] 1 K. B. 49.
(6) [1921] 3 K. B. 643, 651, 654–5.

Shuter v. *Hersh* (1); *Newell* v. *Crayford Cottage Society* (2); *Schmit* v. *Christy*. (3)

Moncrieff K.C. replied.

The House took time for consideration.

1922. Nov. 3. LORD DUNEDIN. My Lords, as I am aware that the majority of your Lordships hold an opinion contrary to mine, and as that opinion is in conformity with the judgment below, it would ill beseem me to express confidence in the result I have arrived at. But as I am fortified by the reflection that my noble and learned friend Lord Wrenbury agrees with me, and as I think it clear that Younger L.J., had he been sitting in this House and not as he was in the Court of Appeal trammelled by authority, would have come to the same conclusion, I shall shortly state my opinion.

The appellant is the landlord and the respondent the tenant of a small dwelling house situate in Clydebank, near Glasgow. The house was let on August 28, 1916, for a month at the rent of 1*l.* 2*s.* 6*d.* per month, the said rent to include occupier's rates. Occupier's rates amounted at that time to 4*s.* 3*d.* per month, so that the net rent was 18*s.* 3*d.* The house was one to which the provisions of the Rent Restriction Act of 1915 applied at that time, and to which the provisions of the Rent Restriction Act of 1920 now apply. The rates were raised, and in consequence thereof the landlord, on July 27, 1920, served a notice in statutory form intimating an increase of 7*s.* 7*d.* per month to be exacted after August 28, 1920, and again on April 26, 1921, another notice intimating a further increase of 10 per cent., bringing up the gross rent to 2*l.* 0*s.* 1*d.*, the further increase to be exactable after July 14, 1921. The rent with the first increase was duly paid up to July 14, 1921. After July 14, 1921, the respondent began to fall into arrear and the present action was raised in the Small Debt Court for the arrears. The defence was that,

(1) [1922] 1 K. B. 438, 445-6, 449. (2) [1922] 1 K. B. 656, 660, 661.
(3) [1922] 2 K. B. 60.

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as the appellant had admittedly served no removal notice to the tenant, unless the statutory form demanding an increase of rent could be taken as such, tacit relocation had taken place and there was no right to the sum sued for. Sect. 3, sub-s. 1, of the Act of 1920 provides as follows: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession."

The case was transferred to the ordinary Court and judgment pronounced by the Sheriff. Appeal was taken to the First Division. The Courts below, following the case of *Newell*, decided by the Court of Appeal in England (1), have held that the period during which an increase was sought was not a period during which, but for the Act, the landlord would be entitled to obtain possession, and they accordingly dismissed the action.

My Lords, the Act in question is, I think, peculiarly framed as regards the order of its sections. It begins with imposing restriction on the raising of rent after March 25, 1920. Now it is obvious that it is quite otiose as regards a current tenancy at an agreed rent, for the raising of rent dealt with in the statute is the raising of rent as against a tenant; it is not, so to speak, the affixing of a label on certain premises that they are not to be let at more than a certain figure, and the existing tenant, if he is under a contract, can stick to his contract and object to any raising of rent under it. Had the Act stopped there it would have quite failed in its object. The object was to protect tenants who had possessed under leases expiring from having their rents raised if they still wished to stay on. The real protection comes in s. 5, which prevents a landlord from resuming possession except under specified conditions which need not be enumerated, but which all represent a state of affairs which the landlord ex proprio motu cannot bring into being. That being so, what is the natural meaning of a period during which, but for the Act, the landlord would be entitled to obtain possession? I lay stress on two things—first, the words are not "entitled to

(1) [1922] 1 K. B. 656.

possess " but " entitled to obtain possession." That points to a continuing action. Second, it is not " is entitled " but " would be entitled." " But for the Act " means if the Act was not there. Now what is it that stops the landlord taking the continuing action which will entitle him to obtain possession ? Surely the provision of the Act which prevents resumption of possession. It seems to me, therefore, that the moment you come to a time when if it had not been for the Act the landlord could have taken proper steps to get the tenant removed but owing to the Act he was not in a position to take those steps, you have a " period during which but for the Act " the landlord would have been entitled to obtain possession. Upon the opposite argument, which is to prevail, the landlord ought to have given a notice which he knew when he gave it was absolutely inept for the purpose it proposed to fulfil.

It is not unworthy of remark that the view of the Act which is now to prevail creates a serious difference between the application of the Act to Scotland and England. For short lets it would be the same, but it was clearly explained by Bankes L.J., in *Newell's Case* (1), that the result is quite different where there is a tenancy for a term of years which expires by effluxion of time. He calls this the first class of tenancies and says : " In the first class the rent cannot be increased until the term has run out, but upon its expiry a notice of intention to increase the rent will be valid without more." No such result would follow in Scotland. Tacit relocation where there has been no appropriate warning follows in a lease for years just as much as in a tenancy of months or weeks.

There are two other points I ought to mention to show that they have not been overlooked. The learned counsel for the appellant sought to argue that assuming he was wrong on the main point he still should prevail upon the ground that the notice to increase rent was sufficient to operate as a notice to prevent tacit relocation, and he cited some cases, of which *M'Farlane* v. *Mitchell* (2) may be taken as typical.

(1) [1922] 1 K. B. 660. (2) 2 F. 901.

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I agree with Lord Mackenzie, who said that no such case could be here raised. Those were all cases where on the facts an implied acceptance of new terms was proved, which acceptance excluded the idea of tacit relocation. Notice to prevent tacit relocation must, in the case of a small dwelling house, be in the form provided by the House Letting Act of 1911, and the statutory notice here given to increase the rent cannot be tortured into that form.

On the specialties, therefore, I do not think the appellant can succeed, but on the main question I think he is right, and I consider that the appeal should be allowed.

LORD ATKINSON. My Lords, the principal if indeed not the only question for decision on this appeal is the construction of s. 3, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17). A previous Act in pari materia, entitled the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was repealed by this Act of 1920. The transactions to which these statutes apply—the first while it was in force, and the second since it was enacted —are as follows :—

A dwelling house, No. 6, Union Street, Clydebank, was, on August 28, 1916, let by the appellant Richard Kerr, through his factors, the appellants James Stewart & Sons, to the respondent at a rent of 1*l.* 2*s.* 6*d.* for a period of one month, including the occupier's rates ; the rent being 18*s.* 3*d.*, and these rates 4*s.* 3*d.* per month. The standard rent of this house, within the meaning of the Act of 1920, is 1*l.* 2*s.* 6*d.*, and the net rent within its meaning, 18*s.* 3*d.* The tenant entered into possession of this house at the date of the letting, and still continues in possession of it. On July 27, 1920, the appellant, by his factors, served upon the respondent a notice in the form prescribed in the First Schedule to the latter statute, informing the respondent of his, the landlord's, intention to increase the rent then payable by 9·9 per cent., to become due and payable on August 28, 1920. On April 26, 1921, the landlord, by the same factors, served on the respondent another notice, similar to the first, and equally conforming to the requirement of the

said First Schedule, expressing his intention to further increase the rent payable by the respondent by 10 per cent. from and after July 14, 1921, which would raise the monthly rent to 2*l.* 0*s.* 1*d.*, of which 1*l.* 9*s.* 10*d.* represented the rent, 10*s.* 3*d.* represented the occupier's rates. The respondent had fallen into arrear. At the time the small debt summons was served upon him he owed 4*l.* 11*s.* 9*d.* to the appellant. It is admitted that no notice to quit or to remove was ever served by the appellants on the respondent. The appellants contend it was not necessary to serve either of them. The respondent contends that the contract made in July, 1920, was continuing by tacit relocation, except that the amount of rent had been increased by the amount of rates payable by the landlord.

The respondent stated three pleas in law in the proceedings, Nos. 2 and 3 of which are important and run as follows :—

" 2. The periods in respect of which increases under said Act of 1920 are asked by pursuers not being periods during which, but for said Act, pursuers were entitled to possession, the said increases are not due by the defender.

" 3. The defender not being in arrear with his payment of rent, pursuers are not entitled to possession."

The second of the defender's pleas is based upon the provisions of s. 3, sub-s. 1, of the statute of 1920, which runs thus : " Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession."

The respondent contends that no notice to quit or to remove having been served upon him by the appellant, there never was a period created during which but for this Act of 1920 the landlord would be entitled to obtain possession, and therefore that the increases of rent were illegal. The Sheriff-Substitute, on March 22, 1922, decided in the respondent's favour on his pleas 2 and 3. The present appellants appealed against this interlocutor of the Sheriff-Substitute to the Sheriff, who, on April 25, 1922, refused the appeal and adhered to the interlocutor of the Sheriff-

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Substitute. Against this interlocutor of the Sheriff the appellants appealed to the First Division of the Court of Session, which, following numerous English and some Scots authorities, affirmed, on June 24, 1922, the interlocutors of the Sheriff and Sheriff-Substitute, dismissed the appeal, and remitted the cause to the Sheriff-Substitute. The words in s. 3, sub-s. 1, "but for this Act," can, in my view, only mean if this Act had not passed. The provisions and the powers conferred by this Act of 1920, touching this matter of the landlord's title to obtain possession, are therefore to be put aside in considering when and under what conditions does a landlord, under the ordinary law, become entitled to obtain possession. It is in respect of the period during which he would, under the ordinary law and independently of the statute, be entitled to obtain possession, that increase of rent is authorized. The time at which a landlord may demand the increased rent is immaterial. It is the period in respect of which the increase is permitted that is the decisive matter. In my view the landlord can never, in any true sense of the words, be entitled to obtain possession of a tenanted holding till the tenancy of the tenant has been determined. Up to the moment of determination the possession of the holding belongs to the tenant, and no person, not even his landlord, has the right to deprive him of it. He could sue the landlord for trespass if the latter entered upon the holding without his, the tenant's, consent. As soon as the tenant's interest has been determined, the landlord can, under the ordinary law, let his property to any tenant he pleases, at any rent he can induce the incoming tenant to pay; and, in my view, it is just because of this absolute dominion which the landlord acquires over his own property while he is in possession of it that, by analogy, the power is left to him under the Act of 1920 to get an increase of rent during the notional existence of such a period. In one sense, but in my view a most artificial sense, a landlord has a title to obtain possession of a tenant's holding long before the latter's tenancy terminates. In England, if he should let a holding by lease for a term of twenty years, he is, from the moment of its execution, seised and possessed

of and entitled to a reversion which will enable him to obtain possession of the holding when the term has expired. If he lets to a tenant from year to year and serves a notice to quit, he has while the notice is current, and before it takes effect, a title to obtain possession when it shall have taken effect. If the landlord of a dwelling house leases it, and there is a covenant in it by the tenant that he will not carry on any noxious trade in it, or that he will not use it for betting purposes or suchlike, with a clause of re-entry on condition broken, the landlord from the moment he gives notice that the breach has occurred and that he will re-enter, is *entitled*, because of the clause, to obtain possession. If he brings an action of ejectment, it may be a couple of years before the Sheriff, on a writ of habere, expels the tenant and hands over to the landlord the possession. This might occur under the ordinary law if the Act of 1920 had not been passed. Is it possible to conceive that this legislation was ever intended to take effect during the period of two years while the landlord was fighting to get actual possession, as a measure of the period in respect of which he might, under the Act, increase the rent of his tenant? The landlord was all along entitled to obtain possession, but he did not succeed in proving that by law the tenant's tenancy had determined.

The use of the word "obtain" is, I think, unfortunate and misleading, for the simple reason that the obtaining in fact by the landlord of possession may be a very tedious process, however well entitled to it he may be. Its success is doubtful occasionally. If the draftsman had used the simpler and better understood words, "enter into *and keep* possession," much, if not all the difficulty would have been avoided, because it would have been made clear that the period in respect of which the rent might be raised under the Act of 1920 was the period during which, under the ordinary law, litigation had successfully ended and the landlord had gone in and taken possession. It is the remnant of the powers, I think, which the ordinary law under such conditions as these conferred upon landlords of houses to which the Act applies that was intended to be preserved to them by

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s. 3, sub-s. 1, and not the right to enforce payment of an increased rent in respect of a period during which, though the landlord's title was ultimately proved, it was in dispute and he was unable to go into, take, or keep possession. No doubt one should endeavour to construe statutes so as to reconcile their various provisions, the one with the other, to knit them, in each case as it were, into a consistent whole, but the use of ill-chosen drafting terms may often defeat the boldest efforts in that direction, and force the authorized interpreter of the statute rather into the position of a legislator so as to give to the terms of the statute a meaning its authors never intended to convey. I am unable to give to the words "entitled to obtain possession," in s. 3, sub-s. 1, a fanciful meaning, which according to the ordinary law I believe they never bore, merely to get rid of some unnecessary or useless proceeding. Sect. 5 of the Act of 1920 preserves to the landlord the right to eject for non-payment of rent and for the other matters enumerated.

Sect. 15, sub-s. 1, provides that the tenant who retains the possession of a dwelling house to which the Act applies shall, so long as he retains possession, observe and be entitled to all the benefits of the terms and conditions of the original tenancy. I agree, however, that if the tenant retains possession, not by virtue of the terms of the statute but under and by virtue of a new agreement or tacit relocation, to either of which it is fairly attributable, the Act does not apply. If once, however, a notice to quit be served and the tenant's interest be determined, the landlord can only obtain increases of rent under the condition and to the extent permitted. I am clearly of opinion that the decision appealed from, which is in conformity with almost all those to which we have been referred, was right and should be affirmed, and that this appeal should be dismissed with costs.

LORD SUMNER. My Lords, since the arguments in this case terminated I have had the advantage of reading and considering the opinion of my noble and learned friend, Lord Wrenbury. Needless to say, I never come to a conclusion

opposite to his without feelings of mingled misgiving and regret.

To deal first with the section here particularly in question, s. 3, sub-s. 1, I think, subject to a point to be mentioned presently on the words "but for this Act," that clearly the appellants can only succeed, if it can be predicated of them that, for the period in question, as to which they purported to increase the rent, they would, but for this Act, during that period, that is, during every moment of that period, be entitled to obtain possession. I will not say that this means obtain possession exclusively under a judgment, order, or decree of some Court, but it certainly includes such a mode of obtaining possession and in practice generally refers to it. The words cannot have a different construction according as the landlord does or does not, on the hypothesis involved in the words "but for this Act," need to apply to a Court.

I think that a landlord would be "entitled to obtain possession" from a Court and by virtue of its decision, when, but only when, he has performed all conditions precedent, and when, but only when, in the language of English pleaders, all times have elapsed and all things have been done and have happened necessary to complete his title to submit to that Court the proposition that, at the commencement of his proceedings in the Court, his right to obtain from the Court the relief which he claims had become complete. In the case of the tenancy now in dispute I understand that, before the passing of any legislation, such as we now are construing, this would have involved the giving of a notice of removal—anglicé, a notice to quit.

It is said that before the beginning of the period for which the appellants purported to increase the rent, they were entitled to give a notice of removal and thereby to put themselves in a position to pray the appropriate Court to decree them possession and, on that prayer, to obtain possession. Esto. I cannot, however, think that, upon a sound construction of the section, a landlord would be entitled to obtain possession in circumstances in which he is not presently so entitled, but is only presently entitled to do acts which,

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when done, will constitute a performance of conditions precedent to his title so to obtain possession, which acts, moreover, so long as they are unperformed, constitute an effectual bar to his being so entitled. Suppose a tenancy for a term certain, to continue after the determination thereof till the expiry of a six months' notice to quit. A landlord would be entitled to give that notice at any time during the term certain, though of course it would not begin to operate till the expiry of the fixed term and would not effect the determination of the tenancy till six months had elapsed from that expiry. On this argument, as it seems to me, the landlord could raise the rent under s. 3 from the beginning of the term certain, if his right to give the notice is the critical matter: if it is not, but if only his right to the assistance of the Court is the critical matter, then not only must the notice be given but it must take effect by effluxion of time before he is entitled to obtain possession. Further, I do not think that the inclusion of provisions as to mortgages in the same section as provisions as to tenancies affects the matter. The Legislature has been economical of words, but the words used are to be read according to the subject to which they refer.

My Lords, I have proceeded on the assumption that it is important to observe that the words are "entitled to obtain possession" and not "entitled to possession." I am not, however, sure that very much turns on this, for, by s. 12, sub-s. 1 (*g*), the very word "landlord" includes a person who would, but for this Act, be entitled to possession, and I doubt if the Legislature contemplated that s. 3 could be deemed in certain cases to run thus "except in respect of a period during which but for this Act a person, who but for this Act would be entitled to possession, would be entitled to obtain possession." If the word "obtain" is otiose I hardly think the present contention can arise.

It is said that in view of the Act the service of a notice to quit is futile and a nullity. It is said further (i.) that in fact the appellants gave such notice as was necessary—namely, a notice, which, in substance if not in form, was a notice to quit, and (ii.) that in any case the question is as to

the rights of a landlord "but for this Act"—namely, but for 10 & 11 Geo. 5, c. 17, or, in other words, as they stood immediately before the passing of this Act, that is, after the common law of landlord and tenant had been limited by the provisions of 5 & 6 Geo. 5, c. 97. I will deal with these points separately.

My Lords, it seems to me quite clear that the scheme of the Increase of Rent (War Restrictions) Acts, is, as the name suggests, to benefit a tenant by tying a landlord's hands, in cases to which the Acts apply, by forbidding him to increase the rent, when under the common law and the pre-war legislation he would have had the opportunity of validly doing so.

I can find nothing either in the language or the policy of this legislation to show that it was intended to permit a landlord to raise a rent during a period in which under an existing contract, however arising, he was not entitled to do so, or was only entitled to do so after a notice had been given and had expired. Wherever the tenant has, for a time which is or can be made certain, the right to hold possession at a given rent, these Acts do not seek to take away that right. Cases may well have happened, and indeed have happened, where a supine landlord has left a tenant to hold over for years before the war, at a rent which, economically speaking, should have been but was not raised. By 1915, and still more by 1920, the tenant was in the enjoyment of a contractual right of great value. If the landlord awoke to his interests, he could terminate it by giving notice, but he could obtain a higher rent, whether from the same or another tenant, only within the restrictions of the Acts. They contain nothing to help him, and, as far as I can see, nothing to disentitle the tenant to as much longer an enjoyment of the old easy terms as the conditions of his contract give him.

The notice that was actually given in this case was in exact accordance with the form prescribed by the Act then in force. It is not, in my opinion, a notice of removal or a notice to quit at all. It is meant to be such a notice as will operate, if under the terms of s. 3 the opportunity for giving

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an operative notice has arisen, and not such a notice as will satisfy those conditions and terms, and so enable the landlord to give effectively the notice prescribed by the Act.

In the present appeal I think no reliance can be placed on the saving words "but for this Act." The words are not "during which, as the law stood immediately before the passing of this Act." They are "but for this Act" simply, that is "except in so far as the provisions of this Act interfere with the landlord's being so entitled." This leaves the landlord bound to perform all the conditions which, under his existing contract with the tenant, whatever it may be, have to be satisfied before he can come into Court and say "now give me possession." Even, however, on the appellants' construction, I do not see what there is in the Act of 1915 which relieves the landlord from terminating a consensual tenancy by an agreed act of his own such as giving notice.

I am accordingly of opinion that the case of *Newell* (1) was rightly decided in England, and that the judgment of the First Division of the Court of Session in the present case in Scotland ought to be affirmed.

LORD WRENBURY. My Lords, if this case turned upon any question of the law of Scotland or upon an accurate appreciation of tacit relocation, I should hesitate to differ from the opinions expressed by the learned Sheriffs and the learned judges of the First Division in Scotland. But in fact it does not turn at all upon the law of Scotland, but upon the true construction of a few words in the Rent Restriction Act, 1920, an Act which applies to England and Scotland alike.

As regards the relation which in July and August, 1920, subsisted between the appellants as owners and the respondent as tenant of the small dwelling house in question, I gratefully accept the statement of the learned judges that the monthly let to the tenant was from time to time continued by tacit relocation, and that during August, 1920, he continued to be a contractual tenant and had not become a statutory tenant. And I also accept that to bring that contractual

(1) [1922] 1 K. B. 656.

tenancy to an end that which would in England be called a notice to quit, and in Scotland I understand to be called a notice of removal, would have to be given.

With this premiss I turn to the words which I have to construe. They are as follows: "Section 3. (1) Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession."

The first thing which I note upon these words is this: one effect of the Act is to tie the landlord's hands, to fetter his right of action in respect of the demised premises. For the purpose of the words above quoted I am to ignore that; I am to treat the landlord as being as unfettered as if the Act had not passed.

The next thing which I note is that I have to look for a "period"—a time consisting of so many weeks or months or years—and that this must be a period during which the landlord, if unfettered, would be entitled to obtain possession. In respect of such a period he can demand such an increased rent as the statute allows. The words are not "would have been entitled" but "would be entitled" to obtain possession—they are not "would be entitled to possession," neither are they "would be entitled to take possession," but are "would be entitled to obtain possession." They are not "would be entitled to obtain possession from a Court," but simply "would be entitled to obtain possession."

The third thing I note is (and this is a matter of construction) that the word "during" does not mean "in the course of which," but means "for the duration of which." It is to be a period such that the unfettered landlord would be entitled to obtain possession for the duration of it. If he would be so entitled he can require the increased rent for that period.

For simplicity of expression I will now take the particular circumstances of the present case. Was September, 1920, a period for the duration of which the landlord, if unfettered by the Act, would be entitled to obtain possession? What would be necessary to obtain possession? In order to obtain

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possession the landlord would have to do certain acts. He would have to give a notice of removal. He would, if necessary, have to apply to the Court for an order. Would he be entitled to do those acts? Yes, he would. The verb "to obtain" involves that there is to be action on the part of the landlord (being action which he would be entitled to take), which is to result in his obtaining the possession which theretofore he had not got. The test is not whether he has done those acts or any of them, but whether he "would be entitled" to do them and whether he would be entitled to do them so as to obtain possession for the month of September. The answer to these questions is in my opinion in the affirmative.

He would, if unfettered, be entitled to give a notice of removal and to get an order of the Court. He would, if unfettered, be entitled to obtain possession by doing those acts.

This view is supported by the corresponding words dealing with the case of mortgage interest "except in respect of a period during which, but for this Act, the security could be enforced." The test is not whether the mortgagee has done any act to enforce it, but whether if the Act had not passed he could have enforced it.

I notice that in *Hill* v. *Hasler* (1) Lord Sterndale M.R. says: "The words 'entitled to obtain possession' seem to me to mean having a legal right to possession." With great respect, I cannot agree. Having a thing is essentially different from obtaining a thing. "Having" is not the same thing as "obtaining," but is a consequence of "obtaining." What I have to seek is the answer to the question whether the landlord, if unfettered, would be entitled to obtain a thing. Atkin L.J. says that the words in question mean "a period during which the landlord would have a legal right to obtain possession of the premises, that is to say, a period commencing at the time when the tenant would no longer have a legal right to remain in possession under the original tenancy." The earlier half of this sentence

(1) [1921] 3 K. B. 643, 652, 655.

seems to me right, but the latter half is not the same, but a different proposition.

I go straight to *Newell* v. *Crayford Cottage Society* (1) without staying to comment upon the other authorities cited to us, because *Newell's Case* deals with the whole question of the construction of the Act, and it is sufficient to give the reasons why, in my judgment, that case was wrongly decided.

In *Newell's Case* it is instructive to notice that both Bankes and Scrutton L.JJ., in stating the question to be answered, allow themselves to slip into the error of substituting "would have been entitled" for "would be entitled." And I may pause to point out that Bankes L.J. previously, in *Shuter* v. *Hersh* (2), and Lord Sterndale, in *Hill* v. *Hasler* (3), fell into the same error of language. In *Newell's Case* (1) Younger L.J., at the end of his judgment, uses the correct words "would be entitled." I entirely sympathise with Younger L.J.'s judgment, and regret that he did not allow the reasoning of the earlier part of his judgment, which seems to me quite correct, to lead him to the conclusion to which it points.

Let me look at the result of *Newell's Case* (1) if it is right. One result of the Act is that the landlord cannot obtain possession from the tenant against the will of the tenant. If he gives him a notice of removal, no removal will or can ensue against the will of the tenant. The notice of removal will result in nothing at all except that that which was a contractual tenancy will for the future be a statutory tenancy. The object and effect of a notice of removal if it can be legally given is not to stop short at affecting the nature of the tenancy, but to get rid of the tenant. This the landlord cannot do. The Act forbids it except in certain circumstances. But, for the purpose of the words which have to be construed, I have to assume that the Act does not forbid it, and to see what the landlord "would be entitled" to do. I have not to see whether he has done it, but whether in the hypothetical

(1) [1922] 1 K. B. 656, 659, 661. (2) [1922] 1 K. B. 438, 445.
(3) [1921] 3 K. B. 643, 652, 655.

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circumstances he " would be entitled " to do it. The decision in *Newell's Case* (1) involves that in order to obtain the increased rent to which under the Act the landlord may by taking proper steps become entitled, he must first give a notice, which under the Act he cannot give so as to effect the removal which it purports to demand—a notice which the landlord knows when he gives it is idle, a notice which the tenant, when he receives it, is entitled to disregard. This is reducing the Act to an absurdity. If I am right as to the proper construction of the words, it is an absurdity which does not arise. I think that the words " would be entitled to obtain possession " mean exactly what they say—and that I have only to inquire whether the period for which the increased rent is charged, is a period for the duration of which, but for the Act, the landlord would be entitled to obtain possession by taking the proper steps for that purpose.

In my judgment, *Newell's Case* (1) was wrongly decided, and this appeal should be allowed.

LORD CARSON. I agree with the conclusions arrived at by my noble and learned friends Lord Atkinson and Sumner, that this appeal fails.

If the Act of 1920 had not passed, the tenancy in dispute could only have been terminated by giving a notice of removal or notice to quit, and without such notice the landlord would not be entitled to obtain possession, nor could he, except by the consent of the tenant, increase the rent. If the contention of the appellants is to be accepted, the Act, which is clearly intended to protect tenants to whom it applies, would confer a right upon the landlord to increase the rent without the necessity of serving any such notice of removal or notice to quit. I do not think such a result can have been contemplated.

A landlord would, in my opinion, be entitled to obtain possession within the meaning of s. 3, sub-s. 1, only when he had taken all such steps as the law made obligatory

(1) [1922] 1 K. B. 656.

for terminating the tenancy and was thus in a position, if it became necessary, to ask for relief in a Court of justice.

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Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 3, 1922.

Agents for the appellants: *Beveridge & Co., for Pirie & Stewart, Glasgow, and Mackenzie & Fortune, S.S.C., Edinburgh.*

Agents for the respondent: *Godfrey, Warr & Co., for D.D. Cormack, Dumbarton, and Dove, Lockhart & Smart, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

NORTH BRITISH RAILWAY COMPANY . APPELLANTS;
AND
SCOTT . . . . . RESPONDENT.

H. L. (Sc.)* 1922 *Nov.* 3.

Revenue—Income Tax—Assessment on Railway Company in respect of Officers' Salaries—Salaries paid without Deduction of Income Tax—Basis of Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sch. E—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. E—Income Tax Act*, 1860 (23 & 24 *Vict. c.* 14), *s.* 6.

In assessing a railway company under s. 6 of the Income Tax Act, 1860, for the duties payable under Sch. E in respect of offices and employments of profit held under the company, where the company agrees with its officers not to exercise the right conferred upon it by the section to deduct or retain out of the salaries of its officers the duty so charged in respect of their profits and gains, the amount paid by the company as income tax in respect of the salaries of its officers and not deducted is part of the officers' income for income-tax purposes, and the company is assessable on that basis.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

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affirming a determination of the Commissioners for the Special Purposes of the Income Tax Acts upon a case stated for the appellants, the North British Railway Company, under the Taxes Management Act, 1880.

The appellant company appealed to the Commissioners against an assessment to income tax under Sch. E. for the year ending April 5, 1919. The assessment was made upon the company under s. 6 of the Income Tax Act, 1860, in respect of offices and employments of profit held in or under the company.

The appellants were under a contractual obligation to their officers not to exercise the discretionary right conferred upon them by the section to deduct tax from their officers' salaries, and accordingly they paid to each of their officers the agreed amount of salary in full without any deduction on account of income tax. The assessment was made on the basis that the salary of an officer of the appellants was the total sum applied by the appellants on his behalf, first, by way of direct payment to him, and, secondly, by way of payment to the revenue of the amount of income tax appropriate to the sum directly paid to him. Prior to the making of the assessment in question the appellants had never been assessed to income tax under this section in sums greater than the amounts actually paid by them to their officers, although they had not at any time deducted income tax upon payment to their officers of the said amounts.

The appellants contended that the assessment made upon them should be on the amount actually paid by them to their officers.

The Commissioners confirmed the assessment, subject to the opinion of the Court upon the question whether the sum paid by the appellants as income tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers was part of the officers' income for income-tax purposes.

The First Division (the Lord President, Lord MacKenzie, and Lord Cullen) answered this question in the affirmative and affirmed the determination of the Commissioners.

1922. July 27. *Graham Robertson* (of the Scottish Bar) and *Hon. Geoffrey Lawrence* (of the English Bar) for the appellants. Under s. 6 of the Income Tax Act, 1860, which renders a railway company liable for the income tax payable in respect of offices and employments of profit held under it, the company is liable only for the income tax on the amounts of the salaries actually paid by it to its officers and is not liable for income tax on such income tax. The forbearance of the company to deduct the income tax which it has had to pay in respect of those offices is no doubt an advantage to the officer, but a material advantage which makes a salary of higher value is not income for the purposes of the Income Tax Acts. A person is chargeable not on what saves his pocket, but on what goes into his pocket. *Tennant* v. *Smith* (1) applies by analogy. The income tax paid by the company on its officers' salaries is a statutory debt of the company and can never be paid by the officer. It is therefore no part of the officer's income. In the absence of clear words of charge it is not competent to the Crown to make the assessment complained of and to depart from a construction of the statute uniformly adopted by the Crown for sixty years.

[They also referred to *Great Western Ry. Co.* v. *Bater.* (2)]

Sir Ernest Pollock A.-G. and *C. D. Murray L.A.* (with them *Reginald Hills* (of the English Bar) and *A. N. Skelton* (of the Scottish Bar)) for the respondent.

Duty under Sch. E is chargeable on all persons holding offices or employments of profit under a company for all salaries, wages or profits accruing by reason of such offices or employments, and the only effect of s. 6 of the Act of 1860 is that the holders of these offices are assessed through their employers instead of directly. The total salary of the officer includes the amount paid in income tax thereon whether the tax is payable by the officer or by the employer. The amount paid in tax is to be reckoned as part of his salary on the same principle as the amount of tax on a dividend paid free of tax to the shareholder of a company is reckoned

(1) [1892] A. C. 150. (2) [1922] 2 A. C. 1.

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as part of the dividend: *Attorney-General* v. *Ashton Gas Co.* (1); *Samuel* v. *Inland Revenue Commissioners.* (2)

Graham Robertson replied.

The House took time for consideration.

1922. Nov. 3. LORD DUNEDIN. My Lords, this appeal has to do with an income-tax assessment for the year ending April 5, 1919.

By the Income Tax Act of 1860 it is provided, in s. 5, that assessments for income tax on a railway company shall be made by the Special Commissioners in lieu of the General Commissioners, who are debarred from making any such assessment.

Sect. 6 of the same Act is in these terms: "In like manner as aforesaid the Commissioners for Special Purposes shall assess the duties payable under Schedule E in respect of all offices and employments of profit held in or under any railway company, and shall notify to the secretary or other officer of such company the particulars thereof, and the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied accordingly; and it shall be lawful for the company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profits and gains."

There are certain officials of the appellant company whose salary is fixed at a specified sum in cash, the company at the same time coming under contractual obligation to make no deduction in respect of the income tax paid by them in terms of the said section.

A test case was taken. The Special Commissioners assessed the income tax on such a sum as would when the income tax thereon was deducted leave a sum equal to the sum in cash which the company paid to the official.

A case was stated for the opinion of the First Division of the Court of Session, in which case the above-mentioned

(1) [1904] 2 Ch. 621, 623; [1906] A. C. 10. (2) [1918] 2 K. B. 553.

facts were set forth and the question for the Court stated thus: "The question of law for the opinion of the Court is, whether the sum paid by the appellants as income tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers, is part of the officers' income for income tax purposes.

The First Division of the Court of Session affirmed the determination of the Commissioners. Appeal has now been taken to your Lordships' House.

Turning back to the sixth section of the Act, we find that the first duty of the Commissioners is to assess the duties payable under Sch. E in respect of offices and employments held in or under the railway company. That necessarily sends us to Sch. E. Sch. E, which is to be found in the Act of 1853, imposes the duties "for or in respect of every . . . . employment of profit," and by Rule 1, which is contained in s. 146 of the Act of 1842 and is applicable to Schedule E of the Act of 1853, "the duties shall be annually charged . . . . for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices."

Now each office must be dealt with separately. It is obvious that if the official here in question were asked what profits whatsoever do you get from your office, his answer would have to be: "I get x pounds in cash and I get the income tax due in respect of my salary paid by the company." It would therefore be on the aggregate of these two sources of profit that the duty would have to be calculated. Now, it is true that when that is done the duty so assessed is by the second part of the clause in s. 6 made to be an assessment on the company; it has to be laid on and paid by the company—the official himself has no concern with it. Most of the appellants' argument was rested on the fact that this was a company debt and not the official's debt; and it was contended that the company could not be asked to pay an assessment on an assessment. The fallacy of this argument consists in ignoring the fact that, though this is a company debt, the measure of that debt is not any liability of the company, but is what would be the liability of the official

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under Sch. E if that liability were not transferred to the company by the section; and the concluding words of the section are strictly accurate when, dealing with the power given to the company to deduct from the salary of the official the sum they have had to pay, they characterise the duty as so paid in respect of his, i.e., the official's, profits and gains.

The appellants further attempted to urge that the decision appealed against practically took away from the company the option given by the section to deduct or refrain from deducting. It does no such thing. The power to deduct was necessary in order to deprive the official of the contention that the debt being made a company debt there could be no right to make him pay by way of deduction what was not his debt. And if the company chooses to deduct (in cases where they have not as here bound themselves by contract not to do so), it follows that the official's total emolument is the conditioned salary of x pounds from which the income tax was deducted. Then, if as here they elect not to deduct, they are by their action making it that the total emolument of the official is not only the cash salary but also the sum necessary to maintain that cash salary at its undiminished figure.

For these reasons I am of opinion that the judgment appealed from is right and that the appeal should be dismissed with costs.

Towards the end of the argument a point was mooted as to whether the calculation of the amount payable as tax was correct. The question is not open, for in the case it is stated that the appellants admit that upon the assumption that they were wrong on the general question the assessment was correct. I shall therefore express no opinion on the point.

LORD ATKINSON. My Lords, the facts have been already stated. The 146th section of the Income Tax Act of 1842 (5 & 6 Vict. c. 35) provides that the duties thereby granted contained in Sch. E shall be assessed under the rules thereto

following, which rules are to be deemed and construed as part of the Act.

Under the first of those rules these duties are to be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in Sch. E, or to whom the annuities or stipends therein mentioned shall be payable, for all salaries, fees, wages, perquisites, or profits whatever accruing by reason of such offices, employments, or pensions, after deducting the amount of the sum or sums payable or chargeable on the same by virtue of any Act of Parliament where the same shall have been really bona fide paid and borne by the party to be charged.

The case of *Beaumont* v. *Bowers* (1) illustrates what is the nature of the sums to which these last words of the rule apply. Beaumont was the clerk of the guardians of a Poor Law Union. Under the provisions of the twelfth section of the Poor Law Officers' Superannuation Act of 1896, he contributed annually for the purposes of the Act a sum of 15*l.* 10*s.*, which was deducted from his salary. He claimed and was held to be entitled to deduct this contribution from the sum on which he was assessed for income tax under this rule. The officer was apparently under this section compelled to make this contribution if he was to derive any benefit from the superannuation fund.

In *Hudson* v. *Gribble* (2) the decision in *Beaumont* v. *Bowers* (1) was criticised and its soundness doubted, and it was held that deductions made in respect of a contribution to a superannuation fund, agreed to as part of the terms of the employment of an officer of a corporation, did not come within these words of the section, even though the corporation framed the superannuation scheme constituted by it in exercise of statutory powers. These deductions were held to be voluntary payments by the officer and should not be deducted from the sum at which he was assessed for income tax. The case of *London County Council* v. *Attorney-General* (3), referred to in argument in the last-mentioned

(1) [1900] 2 Q. B. 204. (2) [1903] 1 K. B. 517.
(3) [1901] A. C. 26.

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case, was wholly irrelevant, and Lord Macnaghten's well-known judgment in that case has no application to this case, but *Hudson* v. *Gribble* (1) does, I think, establish that if the railway company had, before the Act of 1860 was passed, arranged with the officers of its staff employed for profit as part of the terms of their hiring, that to spare these officers the inconvenience of being each visited by a revenue officer to collect the amount of the income tax for which he was liable, the company would pay in one sum all the income tax for which the staff were collectively liable, and would set off against the salary of each officer the sum paid to the revenue on his behalf, the entire salary of the officer would have been assessed for income tax. No deduction would have been allowed for the tax so paid by his employer on his behalf. I think the same result would have followed even if the company, either from benevolence or from any other motive, declined to set off the amount they had paid for, or on behalf of, an officer in discharge of that officer's statutory liability, because in truth the sum paid by the company is not a sum outside of the officer's salary or independent of it, but is a part of it, and if the employer did not set off this sum against the employee's salary, the latter would simply pocket his full salary, his debt to the revenue having been paid by another, not by himself, that is all.

Now, it appears to me that the Act of 1860 does little more than embody in a statutory form such an arrangement as I have indicated. The duties payable under Sch. E in respect of all offices and employments of profits held under the company are to be assessed; but the only duties assessed and charged under Sch. E are the duties annually charged on persons having, using, or exercising the offices or employments of profit mentioned in the schedule. And that charge is measured in this way. It is to be payable for all wages, fees, perquisites, or profits whatsoever accruing in respect of or by reason of such offices, etc.—each assessment in respect of such office or employment to be in force for one

(1) [1903] 1 K. B. 517.

year. The amount with which the officers are charged and for which they are assessed must be ascertained for the purposes of the Act of 1860, else the indicated retention from or the deduction from their salaries never could be properly made. It would be a mistake, in my view, to hold that the officer is not assessed. He must be assessed, for it is the duty charged in respect of his profits and gains that is to be retained or deducted. Then—for the purpose of the collection of the sums due by those officers of the company—their separate assessments are deemed to be an assessment of the company, one assessment, and to be paid and collected accordingly. By this last provision the company is thus made responsible for the debts, thus lumped together, of their individual officers, and obliged to pay them, and then they can, by retaining out of, or deducting from, what they owe to each officer the sum so paid, recoup themselves for their outlay in this respect. Whether the company avails itself or not of the means provided by statute to enable it to recoup itself for its outlay in paying the debts of its officers is its own concern. Its action in that respect cannot, in my view, affect prejudicially the rights of the revenue. The sums paid by the company to satisfy the debts which those officers respectively owed to the revenue remain part of the profits and gains those officers derive from the offices they respectively hold and are liable to be assessed to income tax, just as the amount of the income tax deducted by a railway company from the dividends it pays its shareholders is part of the income of those shareholders. In truth the whole scheme of the statute amounts to applying the common and convenient method of deducting income tax at the source. I accordingly think that the question submitted in the case as stated for opinion of the Court was rightly answered by the First Division of the Court of Session.

The appeal, I think, fails and should be dismissed with costs.

LORD SUMNER. My Lords, I agree that the appeal fails.

LORD WRENBURY. My Lords, this case was argued upon the sections of the Income Tax Acts, 1842, 1853, and 1860,

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and not upon the corresponding sections of the Income Tax Consolidation Act of 1918.

Under the First Rule of Sch. E of 1842 the assessment is to be made upon the person having the office or employment "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions." Under the Income Tax Act, 1860, s. 6, the persons to make the assessment are the Special Commissioners, and they are to assess the duties payable under Sch. E in respect of offices and employments of profit held under a railway company (this being the assessment to be made under Sch. E of 1842) and are to notify the secretary of the company, "and the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied accordingly," and it is to be lawful for the company to deduct out of the salary of the officer the duty charged "in respect of his profits and gains." These last words are material.

The assessment therefore remains as regards its amount the same as it was under the Act of 1842, and is to be deemed something which it is not (namely, an assessment on the company), and being so deemed is to "be an assessment upon the company" and to be paid accordingly. The result is that the company becomes debtor for that which would otherwise have been—and seemingly under the Act of 1842 still is—the debt of the officer, and which is measured by the profits and gains of the officer.

In the case before us "the railway company are under contractual obligation to the officer that they will not exercise their statutory discretionary right to deduct tax from his salary." In other words, having paid the tax on his income they will not charge him with it. The question is what are the "profits and gains" for income-tax purposes of an officer employed upon those terms?

If the salary which the officer is to receive net is 100*l.*, the "salaries, fees, wages, perquisites, or profits whatsoever" which form the reward of his service, are the 100*l.* and the contractual benefit that when the company has paid the tax

due for his income tax (whose payment is imposed upon the company by the statute) they will not deduct it against him as they might. This is a further valuable consideration or profit accruing to the officer by reason of his office and is a factor in arriving at his assessable income for income tax purposes. His total "profits and gains" are the aggregate of these sums. The appellants say that by such an assessment the revenue takes tax on tax. Certainly—so it does. But every one who pays 5*s.* in the pound income tax pays tax not only on the 15*s.* which he retains, but also on the tax of 5*s.* which he has to pay. The question for the opinion of the Court is therefore to be answered by saying that the sums paid by the appellants as income tax on the officer's profits and gains form part of the officer's income for income-tax purposes. It follows that this appeal must be dismissed with costs.

LORD CARSON. My Lords, I concur that this appeal be dismissed with costs.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 3, 1922.

Agents for the appellants: *Lewin, Gregory & Anderson, for James Watson, S.S.C., Edinburgh.*

Agent for the respondent: *The Solicitor for England of the Board of Inland Revenue, for the Solicitor for Scotland of the Board of Inland Revenue.*

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of a special case awarded that the buyers, who at the end of July, 1920, had claimed that they were no longer bound to take the teas under the contracts, had wrongly repudiated the contracts, and awarded damages to the sellers.

McCardie J. set aside these awards mainly on the ground of frustration of the adventure, but his decision was reversed by the Court of Appeal (Bankes, Scrutton and Younger L.JJ.) and the awards were upheld.

The facts are fully stated in the opinion of Lord Atkinson and are summarised in the headnote.

1922. July 11, 13. *Talbot K.C.* and *Leck K.C.* (with them *S. L. Porter*) for the appellants. In every contract the party who brings an action for damages for the breach of it must prove that he was ready and willing to perform the contract, and that includes capacity to perform: *Jefferson* v. *Paskell.* (1) Here the sellers were not ready and willing to perform the contract; on the contrary, they were refusing to deliver according to the terms of the contract and were claiming to deliver under another contract, and that refusal enables the other party to the contract to sue at once without waiting for the time of performance: *Hochster* v. *De la Tour* (2); *Cort* v. *Ambergate, &c., Ry. Co.* (3)

[They also referred to *Frost* v. *Knight* (4) and *Braithwaite* v. *Foreign Hardwood Co.* (5)]

The essence of the contract was delivery in London, and it is obvious from the facts that the sellers never were ready and willing to deliver in London. The arbitrator went on the contract of May 12 as a new contract, and that contract proceeds on the basis that the sellers were not ready and willing to deliver under the original contract. The respondents' case fails at the outset, because not only is there no evidence that they were ready and willing to perform their contract, but there is conclusive evidence to the contrary. Then as to the contract of May 12: the two contracts being

(1) [1916] 1 K. B. 57, 71, 74.
(2) (1853) 2 E. & B. 678.
(3) (1851) 17 Q. B. 127, 144.
(4) (1870) L. R. 5 Ex. 322.
(5) [1905] 2 K. B. 543.

inconsistent, the first is necessarily put an end to, otherwise the Court will be enforcing a contract which does not represent the intention of the parties. A contract to deliver tea in Greenock cannot stand with a contract to deliver in London. It is a new contract with a substituted port of delivery. The old contract is gone by reason of the contract of May 12 and the new contract is unenforceable, because of the absence of any memorandum thereof in writing in conformity with s. 4 of the Sale of Goods Act, 1893. A contract cannot be varied except by a new contract, and, though the new contract may be unenforceable, the old contract no longer holds, because the second contract is inconsistent with the first. Any alteration, except by way of addition, produces an inconsistency, and thenceforward the old contract ceases to be enforceable: *Patmore* v. *Colburn* (1); *Taylor* v. *Hilary* (2); *Stead* v. *Dawber* (3); *Goss* v. *Lord Nugent* (4); *Marshall* v. *Lynn* (5); *Sanderson* v. *Graves*. (6)

Then there is another class of case where no new contract has been entered into at all, but an arrangement has been made as to the mode of performing the original contract—cases where one party has always been ready and willing to perform, but has been prevented from performing by the action of the other party. Where, for example, a vendor, being ready to deliver within the agreed time, voluntarily withholds delivery at the request of the purchaser, he will not thereby be prevented from suing on the original contract if, after the lapse of a reasonable time, the purchaser refuses to take delivery: *Hickman* v. *Haynes* (7); *Plevins* v. *Downing* (8); *Tyers* v. *Rosedale and Ferryhill Iron Co.* (9); *Ogle* v. *Earl Vane* (10); *Levey & Co.* v. *Goldberg*. (11) In *Morris* v. *Baron & Co.* (12) this House held that there was a new contract, which, though unenforceable, operated as a rescission of the original contract, but some of their Lordships

(1) (1834) 1 C. M. & R. 65, 71.
(2) (1835) 1 C. M. & R. 741.
(3) (1839) 10 Ad. & E. 57, 64.
(4) (1833) 5 B. & Ad. 58, 64.
(5) (1840) 6 M. & W. 109.
(6) (1875) L. R. 10 Ex. 234.
(7) (1875) L. R. 10 C. P. 598, 605.
(8) (1876) 1 C. P. D. 220, 225.
(9) (1875) L. R. 10 Ex. 195.
(10) (1868) L. R. 3 Q. B. 272.
(11) [1922] 1 K. B. 688.
(12) [1918] A. C. 1.

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there seemed to think that the test was whether there was an intent to rescind, and they draw a distinction between variation and substitution which it is difficult to understand. The true test is, Is the new contract inconsistent with the old? If it is the old contract cannot stand.

Neilson K.C. (with him *Jowitt K.C.*) for the respondents. The point that the sellers had not stated that they were ready and willing to carry out their contract was not taken before the arbitrator and is not now open. The repudiation of the contract by the buyers was based wholly on the ground that there was an obligation on the sellers to deliver within a reasonable time, and they cannot now rely on the ground that the sellers were not ready and willing to deliver in London: *Braithwaite* v. *Foreign Hardwood Co.* (1) On the question whether the oral agreement rescinded the original agreement, there may be a variation which will not operate as a rescission; it depends upon the intention of the parties. In *Stead* v. *Dawber* (2) Lord Denman says it is a question of fact whether the parties intended to substitute a new contract for the old one. *Marshall* v. *Lynn* (3) was the case of a substitution of one voyage for another. That obviously involved rescission. Again in *Moore* v. *Campbell* (4), where an alteration as to the mode of delivery was held not to operate as a rescission of the original contract, Parke B. says that the parties never meant to rescind the old agreement—thus showing that it is a question of intention. So in *Noble* v. *Ward* (5) a parol agreement extending the time for delivery was held not to be an implied rescission of the first contract, and *Moore* v. *Campbell* (4) was approved. Finally, *Morris* v. *Baron & Co.* (6) shows that there must be an intention to rescind. In *Morris* v. *Baron & Co.* (6), *Noble* v. *Ward* (5) as explained and distinguished was recognized as a binding authority. Where there are two contracts which require to be evidenced in writing, and one is written and one is oral, the

(1) [1905] 2 K. B. 543, 551, 554.
(2) 10 Ad. & E. 57, 64.
(3) 6 M. & W. 109.
(4) (1854) 10 Ex. 323, 332.
(5) (1866) L. R. 1 Ex. 117, 122 (1867) L. R. 2 Ex. 135, 138.
(6) [1918] A. C. 1, 10, 11, 13, 17, 18, 19, 23, 26, 27, 30.

judge as a jury has to look at the surrounding circumstances and has to determine as a question of fact whether there is an intention to rescind the earlier contract by the later. Here the arbitrator has found that fact in the respondents' favour, and therefore his awards were rightly upheld by the Court of Appeal.

Talbot K.C. in reply. *Noble* v. *Ward* (1) appears to be decided on the ground that a contract which is unenforceable by reason of its non-compliance with s. 17 of the Statute of Frauds cannot be used for any purpose, and this point was taken in the argument. If that is the ground of the decision, it is inconsistent with *Morris* v. *Baron & Co.* (2) *Braithwaite* v. *Foreign Hardwood Co.* (3), unless distinguishable, is wrongly decided.

The House took time for consideration.

1922. Nov. 3. LORD ATKINSON. My Lords, this is an appeal from orders of the Court of Appeal dated November 29, 1921, reversing orders of McCardie J. dated June 23, 1921, in favour of the appellants upon three awards of an arbitrator stated in the form of a special case. The question of law stated in each case for the opinion of the Court was whether on the facts stated in the award the buyers were liable to pay damages to the sellers, and further that if the Court should be of opinion that the buyers were so liable, then the arbitrator's award against the buyers, the appellants, for 3766*l.* 10*s.* and costs should stand; that if, on the contrary, the Court should be of opinion that on the facts so stated the buyers were not liable to pay damages to the sellers, his award should be set aside, and in lieu thereof he awarded and determined that the sellers' claim to recover damages should be dismissed. The sum awarded in the second case to be paid by the same buyers to the sellers, the Baintgoorie (Dooars) Tea Company, under identical conditions was 2118*l.* 15*s.* 7*d.* and costs. In the third

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(2) [1918] A. C. 1.
(3) [1905] 2 K. B. 543.

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case the sum awarded to be paid by the same buyers to the sellers, Mazdehee Tea Company, Ld., was 1245*l.* 3*s.* 5*d.*

Three contracts had been entered into between the appellants, the British and Beningtons, Ld., and the three respondents respectively, bearing the respective dates of September 17, 1919; July 11, 1919; and September 26, 1919. By the first, the first respondents, the North Western Cachar Tea Company, sold to the appellants the balance of the crop of the Bicrampore division of the latter's estates of the season 1919–20, dust excluded. By the second, the second respondents, the Baintgoorie Tea Company, Ld., sold to the appellants the whole of their crop of tea for the season 1919–20, excluding dust; and by the third, the third respondents, the Mazdehee Tea Company, Ld., similarly sold to the appellants the whole of their tea crop for the same season (with an exception not material in this case). The first contract, which, so far as is material, is similar in terms to the others, provided only that the teas purchased were to be delivered at a bonded warehouse in London, with an option to the sellers to take delivery ex ship at an allowance of $\frac{3}{4}d.$ per lb. on due notice being given. It provided in addition, amongst other things: (1.) that the price was to be 1*s.* 2*d.* per lb. at exchange, at 1*s.* 8*d.* under usual sale conditions; (2.) that the official estimate of the amount was 4800 maunds, of which 1600 maunds had already been sold; (3.) that the tea was to be accepted and delivered without guarantee as to quality, but to be delivered in sound and mercantile condition; (4.) that any teas rejected by the Customs or certified by any bonded warehouse to be country or sea-damaged to be on seller's account; (5.) that any quantity up to 5 per cent. over the estimated amount was to be taken as part of the contract, any excess over that to be offered to the buyer at one-third less than the contract price; (6.) that should the exchange rise over 1*s.* 8*d.* one halfpenny in the pound to be added to the price for every penny rise, and should exchange fall below 1*s.* 8*d.* one halfpenny to be allowed for every fall; (7.) an arbitration clause.

As will presently be seen, much turns on the existence in

these contracts of these seven provisions, in addition to the provision touching delivery.

Owing to the congestion existing in the Port of London in the early part of the year 1920, the ships carrying the bulk of the tea sold were by order of the Ship Controller diverted away from London to several out ports. Disputes between the parties arising out of these diversions were ultimately referred to the arbitration and award of Mr. John Kenelm Stenning (an expert in the tea trade). These disputes included, amongst others, those between the appellants and the first respondents, relating to the three following shipments—i.e., 977 cases in the steamship *Clan Buchanan*, 167 cases in the *Clan MacBean*, and 159 cases in the *Clan Macdonald*. The first-named of these three ships arrived at Southend on February 6, 1920, and was diverted to Greenock, arriving there on March 1. The second, the *Clan MacBean*, was diverted to Plymouth, arriving there on February 26, 1920. At those ports these two ships discharged into warehouses the tea they respectively carried. The *Clan Macdonald* did not arrive in London till much later, June 27, 1920, when the 159 cases of tea she carried were discharged into a bonded warehouse, but owing to the congestion were not weighed out till August 4, 1920.

The dispute between the appellants and the second respondents had reference to three shipments of 70 cases by the steamship *Maimyo*, 644 cases by the steamship *Maihar*, and 200 cases by the steamship *Malakand*. The congestion in the Port of London caused the first two of these to be diverted to Leith to discharge. They arrived at Leith on February 26 and 23 respectively, and discharged the tea shipped in them into a warehouse. The *Malakand* arrived in London on March 19, 1920. The tea she carried was put into temporary storage, no bonded warehouse being available.

The dispute between the appellants and the third respondents had reference to two shipments of the following tea—namely, 306 cases by the steamship *Clan Robertson* and 220 cases by the *Clan MacBean*. The latter of these was, as already

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mentioned, diverted to Plymouth, arrived there on February 26, 1920, and discharged there into a warehouse these 220 cases with the other tea she carried. The *Clan Robertson* arrived at Southend on December 20, 1919, was diverted to Glasgow, arrived there on February 26, and discharged the tea she carried into a warehouse.

Large quantities of teas other than those belonging to the sellers had been by the Controller diverted to the ports of Greenock, Leith and Glasgow, with the result that those ports were greatly congested and that the weighing of the teas of the seller, which had been landed there, was much delayed. The tea ex the *Maimyo* was ready for delivery on July 12, 1920, and weight notes in respect of it were delivered next day, July 13. The tea ex the *Clan Robertson* was ready for delivery early in July, 1920, and weight notes in respect of it were delivered to the appellants about July 10, 1920. With the exception of these teas, none of the sellers' teas were weighed or ready for delivery before July 28, 1920. During this delay an interview took place on May 12, 1920, between Mr. Wilson Benington, representing the buyers, and Mr. Wilson of the firm of Lloyd, Matheson and Carritt, tea brokers, representing the sellers. Some proposals were made as to the appellants taking delivery at the several out ports of the teas of the sellers which had been discharged there, and ultimately on that day a parol agreement was alleged to have been concluded between these representatives of the respective parties to the effect that the buyers, the appellants, should take delivery at Greenock, Leith and Glasgow, instead of London, of the several parcels of the teas they had purchased which had been taken to those ports, on receiving a reduction of $\frac{3}{4}d.$ per lb. on the tea so delivered.

The buyers insisted that no such agreement had ever been concluded. The sellers contended the contrary. The arbitrator found that a parol agreement to the above effect had been concluded, as the sellers alleged.

It will be observed that this parol agreement, not void but admittedly unenforceable at law under the fourth section of the Sale of Goods Act, 1893, only dealt with one of the several

matters dealt with in the original agreement of purchase and sale concluded between the appellants and respondents —namely, the place of delivery. The seven other stipulations of the original agreement already mentioned were left untouched. The arbitrator has not found within what time this parol agreement was to be performed, nor has he found whether the parties entered into it with a view to substitute it for the original agreement (which would amount to a rescission by parol of the latter) or whether they entered into it with a view of merely varying by parol the original written agreement in respect of one of its terms, the place of delivery, which is the very thing that cannot legally be done: *Morris* v. *Baron & Co.* (1)

I did not understand that it was contended in argument on this appeal that the arbitrator had not evidence before him upon which he might reasonably have found, as he did find, as to the making of this agreement of May 12, 1920. The letters which passed between the parties from July 15 to 28, 1920, both inclusive, touching on this with other matters were before him. In the first of these, dated July 15, 1920, and written by the appellants to Messrs. Lloyd, Matheson and Carritt, the following paragraph occurs: "We believe you are aware of the position which the directors take up, namely, that as several months have elapsed since the teas arrived in this country and they are not yet delivered in London as provided by the contracts, the latter are null and void." The writers proceed to suggest that the sellers should make an allowance of 2*d.* or 3*d.* per lb. if the appellants should take delivery of the teas at the out ports. On July 17, 1920, Messrs. Lloyd, Matheson and Carritt wrote to the appellants informing them that the sellers were prepared, as to the Bicrampore Estate teas, to adhere to the arrangement already made (i.e., the agreement of May 12, 1920) or, if they, the buyers, preferred it, to bring the teas to London when and as opportunity offered and give them delivery there, and that in case of the teas of the Baintgoorie Estate and the Mazdehee Estate they adhered

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to the arrangement made on May 12, 1920. On July 19, 1920, the appellants replied in a letter containing the following passage: "Surely it is the business of the sellers to give delivery to the buyers within a reasonable time. If, owing to force majeure they are unable to do so, the risk is surely theirs and not the buyers'." On July 28, 1920, Mr. J. Howard Moore, one of the directors of the appellant company, wrote to Messrs. Lloyd, Matheson and Carritt, a letter, in which the following passages occur: "It is true that the sellers were not bound to deliver by any particular date, but nevertheless the law implies, as we are advised, an obligation to deliver within a reasonable time. It would be wholly unreasonable to hold us as buyers bound to accept delivery after an interval so long that the market conditions have altogether altered. This would be to impose upon us a new contract which we did not make. We therefore hold ourselves no longer bound by these contracts and return the weight notes enclosed in your letter."

The contention of the buyers, as set forth in these letters, amounts to this, that both contracts are to be construed as if the words "delivery within a reasonable time" were written into each of them. If this reasonable time had not elapsed before July 28, 1920, then it does not appear to me to be possible to hold that there was frustration of either contract, since the limit of time fixed by the contract for the delivery of the goods had not been reached. If the goods were delivered within that time, the contract, despite the exercise of force majeure, would have been fully performed. There was nothing to prevent the bringing of the teas from Greenock, Leith, Glasgow or Plymouth quickly. Unfortunately, the arbitrator has not fixed the length of the reasonable time within which the buyers repudiated. In paras. 15, 16, and 17 of his award he embodies his findings upon many important points. Those paragraphs run thus: "15. The practice of Indian Tea Companies in case of sales in London has always been to ship the tea from India by steamers proceeding to London, where the tea has been landed into a bonded warehouse, but there is not any custom which imposes any

obligation on the seller as to the method of carriage of the tea from India to the London warehouse. When the contract of 17th September 1919 was entered into it was known to the parties that shipping was under Government control and the general conditions of trade were disorganized as a result of the war. The diversion of the said steamers to Greenock and Plymouth and the discharge of the teas there did not so alter the mode of carriage of the teas to London nor was the interruption so great and long as to make it unreasonable to require the parties to go on with the contract. The buyers did not claim that the diversion of the steamers or the discharge of the teas at Greenock and Plymouth of themselves discharged the parties from their respective obligations under the contract until the hearing of the arbitration on 16th December 1920. The buyers did not claim that they had been relieved from any obligation under the contract until the 14th or 15th July 1920 and then only on the ground that a reasonable time for delivery under the contract had expired. Down to the said 14th or 15th July the sellers were acting on the footing that the contract was still in force subject to the modification agreed to at the interview of 12th May 1920 and the buyers knew that the sellers were so acting. The buyers waived the option of taking delivery ex ship and their right to have delivery in London of the tea landed in Greenock. So far as it is a question of fact I find that the contract was not frustrated. 16. The buyers repudiated the contract by their said letters of 15th and 28th July 1920 solely on the ground that the time within which the sellers were bound to deliver had expired. 17. Having regard to all the circumstances I find that a reasonable time for delivery of the teas under the said contract of 17th September 1919 (whether in London or in Greenock as regards the tea discharged there if the verbal contract is enforceable) had not expired on the 28th July 1920. The buyers contended that in determining what was a reasonable time for delivery I should take into consideration the statements made by the sellers' representative at the interview on 12th May 1920. I have done so."

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It is not very clear what is the precise meaning of this seventeenth paragraph. Bankes L.J. considered that it meant that if the agreement with regard to taking delivery at Greenock (i.e., the agreement of May 12, 1920) were enforceable, that delivery was offered to the buyers within a reasonable time; but that, even assuming that that contract was not enforceable and that the teas at the out port had to be brought to London under the terms of the original contract, a reasonable time to do so had not expired before the buyers repudiated the contract by their letters of July 15 and 28. I concur with Bankes L.J. on this point. McCardie J. found himself rather embarrassed by the fifty-sixth section of the Sale of Goods Act of 1893, which provides that what is a reasonable time in any given case is a question of fact; but though he did not hold that there was no evidence to support the arbitrator's finding on this point of reasonable time, he doubted if the evidence was sufficient. I concur with Bankes L.J. in thinking that, the arbitrator being an expert in the tea trade, with special knowledge of such matters, it is impossible to hold that he had not evidence before him reasonably sufficient to sustain his finding. Mr. Talbot, on behalf of the appellants, forcibly contended: (1.) that the contract of September 17, 1919, was rescinded by the parol agreement of May 12, 1920; and (2.) that, even if it only sought to vary the earlier contract, being verbal it was unenforceable, and the sellers had not discharged the burden which lay upon them to prove that at the date of the buyers' repudiation they were ready and willing to deliver the goods sold. As to the first point, there is this difficulty, if there were no other: that the arbitrator has not found that the parties to those two contracts ever intended to rescind the first of them by the second. In *Stead* v. *Dawber* (1) the plaintiff sued the defendants for breach of a contract in failing to deliver to the plaintiff on May 20 to 22 400 quarters of ground bones at 16*s.* 6*d.* per quarter, payment by acceptance three months after delivery. In the declaration in assumpsit it was averred, after these facts had been set out, that on

(1) 10 Ad. & E. 57, 64, 66.

May 17 the plaintiff, at the special instance of the defendants, gave time to the latter to deliver the bones till May 24, and that the defendants had failed to deliver them on that day or at all. The fourth plea filed to this declaration was to the effect that the contract or agreement giving time was part and parcel of a contract for the sale of goods, that there was no memorandum in writing of it, nor did any of those things mentioned in the Statute of Frauds, such as tender, etc., take place. Alderson B., who tried the case, being of opinion that the effect of the enlargement of the time was not to alter the contract, but only to dispense with its performance on the day first named, directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendants on the first and fourth pleas. The first was of non assumpsit. A rule was accordingly obtained. On cause being shown, Lord Denman, delivering the judgment of a Court composed of Littledale, Williams, Coleridge JJ. and himself, said: "The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides. . . . . But it seems to us that we are merely called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of accepted bill, with the old one?" He winds up thus: "Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and, consequently, that the verdict on the fourth plea should be entered for the defendants." This decision was approved of

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in *Morris* v. *Baron & Co.* (1) The fourth and seventeenth sections of the Statute of Frauds, like the fourth section of the Sale of Goods Act, require that the whole, not part of the contract, shall be evidenced by writing. Where a written contract is varied by parol, there is no writing covering both the original and the variation, hence the contract as varied is unenforceable. If the giving of two days' additional time for the delivery of the goods was not, in this case of *Stead* v. *Dawber* (2), treated as a mere concession for the convenience of the plaintiff to facilitate the performance of the written contract of the kind given in *Ogle* v. *Earl Vane* (3) and in *Hickman* v. *Haynes* (4), but a variation of the original contract, it is difficult to see how the parol agreement of May 12 must not be similarly regarded, changing, as it does, the place of delivery of the goods or some of them. A written contract may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it: *Morris* v. *Baron & Co.* (1); *Hunt* v. *South Eastern Ry. Co.* (5); and *Thornhill* v. *Neats.* (6) I have already pointed out that the seven different important matters dealt with in the written contract are not referred to, much less provided for, in the parol agreement of May 12, 1920. There is a single provision for changing the place of delivery of some of the teas which cannot possibly be treated as so inconsistent with the earlier written contract as to go to the root of the latter. The object and purpose of this parol contract was merely to vary the written contract with respect to one of its provisions. That, however, is precisely the thing which cannot be done so as to make the barred contract enforceable at law: *Goss* v. *Lord Nugent* (7); *Marshall* v. *Lynn.* (8)

The sellers, in order to sustain this award, must take their

(1) [1918] A. C. 1.
(2) 10 Ad. & E. 57.
(3) (1867) L. R. 2 Q. B. 275; (1868) L. R. 3 Q. B. 272.
(4) L. R. 10 C. P. 598.
(5) (1875) 45 L. J. (Q. B.) 87.
(6) (1860) 8 C. B. (N. S.) 831.
(7) 5 B. & Ad. 58.
(8) 6 M. & W. 109.

stand on the written contract. And if the buyers had not repudiated it, and had been suing for some breach of it, I did not understand it to be contended that at the time of the alleged breach they were ready and willing to deliver the goods. Lord Abinger, in *De Medina* v. *Norman* (1), laid down that the words, "readiness and willingness," used in such a connection, imply not only the disposition but the capacity to perform the contract. But the point has been urged by the respondents, and was much relied upon by the Court of Appeal, that when a buyer, before breach of a contract for the sale of goods, repudiates it, as was held by the arbitrator the appellants on July 28, 1920, did in this case, and that repudiation is accepted and acted upon by the seller, as it evidently was in this case, the seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing at the date of repudiation to deliver the goods. In *Jones* v. *Barkley* (2) Lord Mansfield says: "Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shewn to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs." In the case of *Hotham* v. *East India Co.* (3), where there was a covenant that the allowance for short tonnage should not be made unless the shipowner procured a certificate from the freighter's agent at the commencement of the voyage, the Court held that a demand and refusal of this certificate was sufficient.

The case of *Cort* v. *Ambergate, &c., Ry. Co.* (4) is something to the same effect. There the plaintiffs contracted with the defendant company to manufacture and from time to time supply to them certain goods, called railway chairs, to be paid for after delivery. The defendant company were by the plaintiffs supplied with, accepted, and paid for a certain

(1) (1842) 9 M. & W. 820, 827.
(2) (1781) 2 Doug. 684, 694.
(3) (1787) 1 T. R. 638.
(4) 17 Q. B. 127, 143, 144.

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portion of these goods. The defendant company then gave the plaintiffs notice not to manufacture any more chairs as they, the company, had no need for them, and would neither accept nor pay for them. The plaintiffs were desirous and able to manufacture the chairs and complete the supply. It was held that the plaintiffs were entitled, without manufacturing or tendering the rest of the chairs, to maintain an action against the purchasers, the defendant company, for breach of contract, and that the proof of this notice enabled the plaintiffs to recover on a count alleging readiness and willingness to perform the contract, and that the defendant company's refusal to accept the goods absolved them from supplying them.

Lord Campbell, in delivering judgment, said: "The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract." He then points out that the defendants had in effect declared that they would not accept or pay for any more of the chairs than they had already received. He then said "that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured?"

In *Braithwaite* v. *Foreign Hardwood Co.* (1) the contract provided for the sale of rosewood in the year 1903 to be delivered at Hull in instalments during the year. While the first consignment was on the sea the buyers repudiated the contract and refused to accept the rosewood, on the ground that the seller had committed a breach of a collateral contract not to supply rosewood to any person in the trade

(1) [1905] 2 K. B. 543.

other than the buyers during the year 1903. When the bill of lading was tendered to the buyers for the first consignment they refused to accept it or to pay for the rosewood covered by it. The seller sold this rosewood and claimed from the buyers, as damages for their refusal to accept, the difference between the contract price and the price at which it was sold. The second consignment was treated in the same manner. The buyers subsequently discovered that some portion of the first consignment, though none of the second, was of an inferior quality, which would be compensated for by an allowance of 6 per cent. The seller having sued the buyers for damages for not accepting the rosewood, the defendants pleaded: (1.) that the purchase was subject to this collateral agreement; and (2.) that they were entitled to repudiate the contract on the ground that the shipments of rosewood tendered under the contract were not of a good, sound and merchantable quality. The learned judge who tried the case found that the collateral agreement never existed, that the repudiation was wrongful, and that it was accepted by the plaintiff as final; but he also found that the first consignment was not according to contract, and that it would have entitled the defendants to repudiate the whole of the consignment had they not previously repudiated. It was this obligation to prove that the first consignment was not of inferior quality that the plaintiff was relieved from establishing. The Master of the Rolls (Sir Richard Henn Collins as he then was) said (1): "The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to take. We must in such a case look to see whether, at the time of each alleged breach, each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract." As Lord Mansfield says (2): "The party must shew he was ready; but, if the other stops him on the ground of an intention not to

(1) [1905] 2 K. B. 552. (2) 2 Doug. 694.

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perform his part, it is not necessary for the first to go farther, and do a nugatory act."

In *In re Bayley-Worthington and Cohen's Contract* (1), Parker J. (as he then was) says: "In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain." He cites *Jones* v. *Barkley* (2), *Ellis* v. *Rogers* (3) and *Perry* v. *Smith.* (4)

I am therefore of opinion that the purchasers, having on July 28, 1920, wrongfully repudiated their contract, the sellers were not, in order to recover damages for breach of this contract, bound to prove that they were ready and willing on that day to deliver the teas at London. No distinction can be drawn between the three cases. The answer to the question submitted by the arbitrator is therefore that the amounts awarded should stand.

LORD SUMNER. My Lords, four points have been argued in this case: (1.) that the three written contracts were discharged by frustration of the commercial purpose of the adventure; (2.) that they were discharged by mutual consent, when the parol contract of May 12, 1920, was made; (3.) that the sellers repudiated their obligations under the written contracts and that the buyers accepted that repudiation and so terminated them; and (4.) that, if, in truth, the buyers repudiated their obligations under the written contracts and the sellers purported to accept such repudiation, the latter were not then ready and willing to perform their own obligations and, therefore, could not recover nominal or any damages for the buyers' breach.

(i.) The arbitrator has found against frustration, so far as it is a matter of fact. It certainly is not a matter of abstract law, and as all this tea reached British ports without mishap and is not a particularly perishable

(1) [1909] 1 Ch. 648, 664.
(2) 2 Doug. 684.
(3) (1885) 29 Ch. D. 661.
(4) (1842) Car. & M. 554.

commodity, any frustration of the commercial objects of the adventure must have been connected with markets and prices or other matters of fact, which were for the arbitrator. I, therefore, think that this point fails.

(ii.) *Morris* v. *Baron & Co.* (1) determines the second point, a case which we have only to appreciate and apply. The question is whether the common intention of the parties on May 12, 1920, was to "abrogate," "rescind," "supersede" or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement, "containing as an entirety the old terms, together with and as modified by the new terms incorporated."

In the present case the old contracts were three and three only. They are expressed in letters, though with a reference to the public sale conditions. In my opinion this reference is exclusively for the purpose of incorporating the arbitration clause, No. 9, and the other clauses, which relate to public auction sales of tea already landed, weighed and delivered out of bonded warehouse and offered for sale by auction in London, are not germane to or incorporated in the bargain now under discussion. In any case neither the letters of contract themselves nor the public sale conditions contain any term, such as one often finds, that "each instalment is to be deemed to be a separate contract" or anything to that effect. It was, undoubtedly, inevitable that the tea which was the subject matter of each contract—namely, the unsold balance of the sellers' 1919–1920 crop, excluding dust—should come forward in several shipments and each shipment would then, for a variety of purposes, connected with carriage, discharge, weighing, payment, and so forth, be treated separately from the other shipments; but it seems clear that, for the purposes of the doctrine of *Morris* v. *Baron & Co.* (1), the original contract in the case of each seller is the entire contract for the sale of the entire unsold residue of the crop in question. Whether the remainder of the tea bought in each case was shipped and disposed of before or after the

(1) [1918] A. C. 1.

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various shipments dealt with in these arbitrations, it is clear, on reducing maunds to pounds, that the shipments dealt with by the arbitrator constituted in each of the three cases a fraction only of the whole of the tea bought, ranging, roughly, from one-seventh to three-fifths, and, even so, in no case was the tea, to which the unwritten agreement of May 12, 1920, applied, more than a fraction of the tea dealt with in each case by the arbitrator, though it was in each case over one-half and in the Baintgoorie (Dooars) case it slightly exceeded two-thirds. Not only did that agreement deal only with a portion of the whole subject matter of each of the original contracts, but it related only to the allowance to be paid for taking delivery at places in Scotland and not ex bonded warehouse in London. It did not include the cases where tea was at Plymouth or in an unbonded warehouse in London, to which the original contracts remained applicable, as they were applicable or had been applied to the large quantities of tea, about which we know nothing except that they were covered by the contracts.

Under these circumstances it is plain that the three original contracts were not made an end of on May 12, 1920, but were meant at most to be subjected to a variation or alteration as to the manner and measure of performance of the original terms. The change does not go to the very root of the original contracts nor is it inconsistent with them: it merely varied the written contract by parol, the situation of the parties being otherwise unchanged. I, therefore, think that the agreement de facto of May 12, 1920, has no effect on the original contracts, not having been reduced into writing and signed by the buyers, and not having superseded the original contracts.

It was, however, argued before your Lordships that, even so, the old contracts were discharged because a varied contract is not the old contract, and as you cannot have a new and varied contract and an old and unvaried contract regulating the same thing at the same time, the old contract, like other old things, must be disregarded. As a matter of formal logic, this may possibly be so, but such was not the view taken

by this House in *Morris* v. *Baron* (1), since, if their Lordships had thought that any variation whatever would make a new contract and discharge the old one, they would have said so expressly and would not have dealt with the extent and completeness of the changes, as they did. The variation may be a new contract, so as to make writing, duly signed, indispensable to its admissibility, for this is a matter of form and of the words of the statute, but the discharge of the old contract must depend on intention, tested in the manner settled in *Morris* v. *Baron & Co.* (1)

(iii.) After May 12, 1920, the sellers asserted in correspondence, which I need not quote, that the matter had been regulated once and for all by the agreement actually made on that date, but they did not, I am sure, thereby intend to intimate, that they would no longer be bound by the original agreements according to their terms. As a matter of fact they obviously wanted to carry those agreements out and to get rid of their tea and collect their money, but they believed and said, that the true way, because it was the agreed way, of carrying out those agreements was for the buyers to take delivery, where it lay, of the tea, which was in Scotland, with an allowance of $\frac{3}{4}d.$ per lb. for doing so. This, I take it, was a reasonable arrangement in the circumstances, in face of a situation which was nobody's fault, since both parties in fact freely agreed to it. Further it was reasonable for the sellers to rely on it, though it had not been duly written out and signed, for in commerce it is not very common to insist that one's word is not as good as one's bond, though legally of course it is in accordance with the Sale of Goods Act. "Anticipatory breach," as it is called, is a matter of intention, and I am satisfied that the real intention of the sellers was to perform their legal obligations, whatever they might be, though they asserted, as in business well they might, that those objections, when examined, would take one form and not another. It might as well be contended, if a man says of any arguable question on a contract that he will take it into Court, that he thereby

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gives the opposite party the right to treat this as a repudiation, in the event of the decision in Court being adverse to the contention.

(iv.) On the last question it is perfectly clear that the buyers did refuse to be bound by the contracts, and that, by demanding arbitration on the point and making no further attempt to deliver the tea in dispute, the sellers accepted that as a final repudiation. This being so, after the opinions above expressed, I am bound to think, and do think, that the buyers must justify the position which they so took up or must fail.

Their answer, as I understand it, is that the sellers cannot claim damages for this anticipatory repudiation, unless they were in such a position, when they accepted it, as to be able to prove that they were then for their part able and willing to perform their obligations under the contracts in accordance with their terms, and that in such proof they must fail, because, as regards the tea lying at Scotch ports, they manifestly could not satisfy an agreed condition precedent—namely, to ship all the tea direct to London and there deliver it ex bonded warehouse. The sellers successfully contested this below on the authority of *Braithwaite* v. *Foreign Hardwood Co.* (1), a decision which bound the Court of Appeal.

My Lords, as reported, that decision is not quite easy to understand. It was presented to your Lordships by the respondents, fortified by the opinion of Scrutton L.J., as a decision that, when there has been a repudiation by one party on a given ground, and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations, and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract, thus repudiated. I have no recollection of that case to carry me beyond the language of the report, as I do not doubt Scrutton L.J. had, but, in my opinion, the case as reported either does not lay down this proposition or, if it does so, is wrong. The majority in the Court of Appeal

(1) [1905] 2 K. B. 543.

in that case expressly refused to decide the question whether the deficiency in the quality of the first consignment would have justified the rejection of the whole of that consignment, had it stood alone, while Mathew L.J., differing from the finding of Kennedy J. (as I think under some misapprehension as to the percentage of the cargo which was inferior to the contract quality), expressly says that it would not. The case was dealt with as one in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages that could be given in evidence in reduction of the claim, and the judgment of Kennedy J., who had thus reduced the plaintiff's damages, was consequently affirmed. In effect it was said that, even after the seller had, as it was called, kept the contract alive and proposed to tender the cargo, he had been told a second time, in terms of the first refusal, "you need not tender any cargo to us at all; *à fortiori* you need not tender a cargo which is in conformity with the contract. You have a cargo of some sort, which we refuse to take; and you may prove your damages for that, if we fail to prove you wrong." Furthermore it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right.

So far the case does not affect the present argument, except that it is ground for saying that this point only went to damages, unless and until it was shown, that the *Spheroid's* cargo and that alone was available for delivery by the plaintiff. I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is of course very material upon the

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question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in futuro or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact, that the buyers have wrongly said "we treat this contract as being at an end, owing to your unreasonable delay in the performance of it" obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's Case* (1) says nothing, which affects the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all.

I am not, however, satisfied in this case that the position of the sellers was one of this kind. It is not found that they could not have forwarded the tea to London, or that the tea, when so forwarded, would not have been still such as the contract provided for. All that can be said is that the tea had not been brought to London direct from India. The contract does not expressly require this. The case stated finds that there is no custom for direct shipment which would impose this method of carriage on the sellers, and all that the parties agreed at the arbitration was that delivery was to be made in London ex bonded warehouse, unless the buyer exercised the option to take delivery ex ship. The question is therefore purely one of construction of the words of the contract. Even if the option, truly construed, is to take delivery ex ship in London and not ex ship in port of discharge, of which I am not convinced, I do not see why we are bound to read this as "ex a ship arriving direct from India in London," so as to make direct shipment to London a condition precedent to any obligation to take delivery at all. At most, I think it would be a term the breach of which would sound in damages; but no damages for this were found. In any case, as a condition, I think it had long been waived,

(1) [1905] 2 K. B. 543.

for, treating the contracts as a whole, it had been obvious from the first that direct shipment, with two exceptions, had failed, and it is only with regard to the difference between an allowance of 3*d.* per lb. and one of ¾*d.* per lb. that any difficulty arose at all.

My Lords, I am of opinion that in all three cases the appeals fail.

My Lords, I am requested to say that my noble and learned friend Lord Buckmaster concurs in the opinion which I have just read.

LORD WRENBURY. My Lords, I also concur.

LORD ATKINSON. My Lords, I am requested by my noble and learned friend Lord Carson to say that he concurs in the judgment just delivered.

Orders of the Court of Appeal affirmed, and declared that the answer to the question submitted by the arbitrator in each of the appeals should be that the amount of his award stands; and appeals dismissed with costs.

Lords' Journals, NOV. 3, 1922.

Solicitors for the appellants: *Parker, Garrett & Co.*

Solicitors for the respondents: *Sanderson Lee, Eddis & Tennant.*

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Nov. 3.

FAIRMAN (PAUPER) . . . . . APPELLANT;

AND

PERPETUAL INVESTMENT BUILDING SOCIETY . . . . . RESPONDENTS.

Negligence—Dangerous Premises—Flats let to various Tenants—Defective common Staircase—Injury to Lodger of Tenant—Measure of Landlord's Liability.

The defendants owned a block of flats which they let to various tenants, the defendants keeping possession and control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the whole length of the tread. Owing to the wearing away of the cement, in some cases irregular depressions were scooped out behind the iron bars. The plaintiff, who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, whilst descending the stairs, caught her heel in a depression so formed, and fell and was injured. In an action for damages against the defendants the trial judge found that the defendants were not guilty of negligence; that the state of the staircase was not dangerous at the time of the accident; that the depression which caused the plaintiff to fall was not in the nature of a concealed danger or trap, but was obvious, and could have been seen by the plaintiff if she had looked:—

Held, (1.) that the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger or trap, and (2.) (by Lord Atkinson, Lord Sumner and Lord Wrenbury; Lord Buckmaster and Lord Carson dissenting as to the effect of the evidence) that the action failed.

Miller v. *Hancock* [1893] 2 Q. B. 177 overruled.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Shearman J.

The respondents were the owners of a block of flats known as Salisbury Buildings, Manton Road, New Kent Road, S.E. These flats were let by the respondents to various tenants, the common staircase giving access to the flats remaining in the possession and under the control of the respondents.

The appellant, Lilian Fairman, had for eighteen months

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

lodged with her sister in a flat on the fourth floor, of which her sister's husband was tenant, and had made use of the common staircase for many months in going to and from the flat.

On the morning of September 12, 1919, the appellant descended this staircase and, owing to its being out of repair, she caught her heel in the third step going down from the first-floor landing to the lower half landing, and fell down and was severely injured.

In January, 1920, the appellant brought an action in the King's Bench Division against the respondents claiming damages for personal injuries by reason of the negligence of the respondents, their servants or agents. The respondents by their defence alleged that the appellant at the time of the accident was not using the staircase on the invitation of or with the leave and licence or permission of the respondents and that they owed no duty to the appellant in respect of the state thereof. They also denied that the staircase was defective or dangerous and that they or their servants were guilty of any negligence, and they alleged that the condition of the staircase was well known to the appellant and that the respondents had no knowledge or notice of the alleged defect or any danger.

The stairs were made of cement reinforced with narrow rectangular bars of iron embedded in the cement. Each stair contained two or three of these bars, which extended along substantially the whole length of the tread. Owing to the gradual wearing away of the cement, in some cases a bar became exposed and an irregular hollow or depression was scooped out behind it by the breaking away of little bits of cement. The accident to the appellant was caused by her catching her heel in a depression so formed.

Shearman J. found that there was no negligence on the part of the respondents; that no complaint as to the state of the staircase had been made to the respondents' caretaker or to anybody; that at the time of the accident neither the staircase as a whole nor the particular step on which the appellant fell was dangerous; that the depression in which

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the appellant caught her heel was obvious to anybody walking up or down the stairs and could have been seen by the appellant if she had looked, and was consequently not in the nature of a trap or concealed danger; and on these findings he gave judgment for the respondents.

This decision was affirmed by the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.).

1922. July 4, 6. *Haldin K.C.* and *Charles T. Williams* for the appellant. This case is indistinguishable from *Miller* v. *Hancock* (1), which was rightly decided. It is a decision of very eminent judges and is founded upon *Smith* v. *London and St. Katharine Docks Co.* (2), which was decided more than half a century ago. The duty of the owner or occupier of premises in regard to the safety of a person coming on those premises differs in degree according as such person is a trespasser, a licensee or an invitee. His only duty to a licensee is not to lay a trap for him, but he owes a higher duty to an invitee. His duty is to take care that his premises are reasonably safe for an invitee using them in the ordinary and customary manner and without negligence: *Hargroves, Aronson & Co.* v. *Hartopp* (3); *Latham* v. *R. Johnson and Nephew* (4); *Norman* v. *Great Western Ry. Co.* (5) In this case the appellant was indirectly the invitee of the respondents. *Miller* v. *Hancock* (1) and *Hargroves, Aronson & Co.* (3), which was recognized by Lord Atkinson in *Cavalier* v. *Pope* (6), decide that in the letting of flats, where the staircase forms no part of the demise, but remains in the control of the landlord, he is responsible both to his own tenants and to strangers having business with them for defects of repair: see Foà on Landlord and Tenant, 5th ed., p. 143. *Huggett* v. *Miers* (7), which is the first case in which *Miller* v. *Hancock* (1) has been distinguished, was wholly different in its facts, because there the landlord by arrangement with his tenants had contracted himself out of his liability

(1) [1893] 2 Q. B. 177.
(2) (1868) L. R. 3 C. P. 326.
(3) [1905] 1 K. B. 472.
(4) [1913] 1 K. B. 398, 410.
(5) [1915] 1 K. B. 584, 590.
(6) [1906] A. C. 428, 433.
(7) [1908] 2 K. B. 278.

to light the staircase. In other recent cases it has been sought to distinguish *Miller* v. *Hancock* (1) on the theory that there was there something in the nature of a trap: *Lucy* v. *Bawden* (2); *Dobson* v. *Horsley* (3); *Dunster* v. *Hollis* (4); but the facts afford no justification for that assumption. On the other hand the principle of *Miller* v. *Hancock* has been accepted and approved by the Court of Session in Scotland: *Kennedy* v. *Shotts Iron Co.* (5); *Mellon* v. *Henderson.* (6) That principle is restated by Buckley L.J. in *Norman* v. *Great Western Ry. Co.* (7)

Harold Morris K.C. (with him *R. O. Roberts*) for the respondents. Qua the respondents the appellant was not an invitee. But, assuming that she was, the only duty of the owner of the premises was to protect her against traps: *Hayward* v. *Drury Lane Theatre and Moss' Empires.* (8) *Miller* v. *Hancock* (1) has been often doubted and often explained, and it is submitted that it was wrongly decided. *Smith* v. *London and St. Katharine Docks Co.* (9), upon which it professes to be founded, proceeded on the principle that persons inviting others on their premises are answerable for anything in the nature of a trap, and in *Indermaur* v. *Dames* (10) Willes J. states the law to be that an invitee is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger, which he knows or ought to know. That is equivalent to a trap. And see *Latham* v. *R. Johnson and Nephew.* (11) *Heaven* v. *Pender* (12) was also a trap case, though that word was not used. If, as has been suggested in *Huggett* v. *Miers* (13), *Lucy* v. *Bawden* (14), *Dobson* v. *Horsley* (3), *Groves* v. *Western Mansions* (15), and *Dunster* v. *Hollis* (4), *Miller* v. *Hancock* (1) can be explained on the trap theory it is not necessary to

(1) [1893] 2 Q. B. 177.
(2) [1914] 2 K. B. 318, 324.
(3) [1915] 1 K. B. 634.
(4) [1918] 2 K. B. 795.
(5) 1913 S. C. 1143.
(6) 1913 S. C. 1207.
(7) [1915] 1 K. B. 584, 591.
(8) [1917] 2 K. B. 899, 914.
(9) L. R. 3 C. P. 326.
(10) (1866) L. R. 1 C. P. 274, 288; affirmed (1867) L. R. 2 C. P. 311.
(11) [1913] 1 K. B. 398, 410.
(12) (1883) 11 Q. B. D. 503.
(13) [1908] 2 K. B. 278.
(14) [1914] 2 K. B. 318.
(15) (1916) 33 Times L. R. 76.

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contend that it is erroneous, though the point was not taken in argument and was not referred to in the judgments, and, so far as appears, the facts do not justify the conclusion that there was there anything in the nature of a trap; but, if in its broadest sense *Miller* v. *Hancock* (1) is held to be right, that would be a great extension of the principle of *Smith* v. *London and St. Katharine Docks Co.* (2) and would involve overruling a whole series of cases. In *Miller* v. *Hancock* (1) the duty was put too high by the Court of Appeal, and this was clearly the personal opinion of Scrutton L.J. in the present case. The only duty of the respondents towards the appellant was not to expose her to an unusual or unexpected danger. That being the law, Shearman J. has rightly directed himself and has found as a fact that there was here no concealed danger and no negligence, and there was ample evidence to support that finding. This House will be slow to disturb the findings of fact of the trial judge unless they amount to a miscarriage of justice.

Haldin K.C. replied.

[The following cases were also referred to: *Grant* v. *John Fleming & Co.* (3); *Hart* v. *Rogers.* (4)]

The House took time for consideration.

1922. Nov. 3. LORD BUCKMASTER (read by LORD CARSON). My Lords, if the case of *Miller* v. *Hancock* (5) be accepted without qualification or restriction as a correct exposition of the law, I agree with Shearman J. in thinking that there is no answer to the appellant's claim, for the difference between the circumstances in that case and those which have given rise to the present dispute is one devoid of legal consequence. It is therefore advisable, before analysing the facts that underlie the present appeal, to examine critically what it was that *Miller* v. *Hancock* (5) established.

The case is reported both in the Law Reports and in the Law Times, and the reports differ both in the narrative of

(1) [1893] 2 Q. B. 177.
(2) L. R. 3 C. P. 326.
(3) 1914 S. C. 228, 236-7.
(4) [1916] 1 K. B. 646.
(5) [1893] 2 Q. B. 177; 69 L. T. 214.

facts and in the words of the judgments. I assume, therefore, that in the Law Reports there was a revision by the learned judges of the judgments that they delivered, and shall therefore accept that as an authoritative statement.

The facts were these: The defendant Hancock owned a building in the city, the different floors of which were let separately as chambers or offices. The staircase by which access to and from the street was obtained remained in his possession and control. The plaintiff, who, in the course of business with one of the tenants, was attending one of these sets of offices on the second floor, fell on the stairs owing to their worn and defective state and suffered injuries for which he sought recompense against the landlord. The jury found that the stairs were in an unsafe condition and that in consequence the accident had arisen. Judgment was accordingly given for the plaintiff, and from that judgment an appeal was brought. The appeal failed. The Master of the Rolls held that the landlord was bound to keep the staircase so as to afford a reasonably safe entrance and exit to the tenants. He added that there was an implied obligation on the part of the landlord to the tenants to that effect. He further stated that there was a relation between the landlord and those who resort to the premises for business purposes, from which the duty arises on the part of the landlord to keep the staircase which is the means of access in reasonably safe repair. Bowen L.J. also said, that as part of the demise, it was intended by necessary implication that the landlord should keep the stairs reasonably safe for the use of persons who go up and down the stairs in the ordinary course of business with the tenants, and Kay L.J.'s judgment depends upon similar considerations. If these statements are accepted without explanation, they appear difficult to reconcile with well-known principles of law, for behind them there is a suggestion that the liability arises from a contractual obligation between the landlord and the tenant, and this could not give rise to any rights by third parties unless the contract was construed as authorizing the tenant to act on the part of the landlord in giving an invitation to those attending

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the premises for business purposes, with wider implications and more serious consequences than an ordinary invitation would confer at common law. I do not think this was intended. Both the Master of the Rolls and Bowen L.J. state that their reasoning is supported by the case of *Smith* v. *London and St. Katharine Docks Co.* (1) In that case a gangway was provided by the dock company from the vessel to the docks. The dock authority knew that the gangway was dangerous, strangers did not. A person lawfully using the gangway fell by reason of its negligent construction and was injured, and the docks company were held liable upon the principle that persons inviting others on their premises were answerable for anything in the nature of a trap. This clearly placed the liability on grounds of tort and disregarded all questions connected with contract. It is, to my mind, only upon that ground that the case of *Miller* v. *Hancock* (2) can be supported.

Now the liability in tort of the owner of premises to those who use them is carefully discussed in the case of *Latham* v. *R. Johnson and Nephew* (3), and the statement of law there is a concise and accurate expression of well-known principles. It is pointed out that the duty varies; being lowest to the trespasser; next to a licensee, and greatest to a person whose position owing to the deficiencies of the English language is described by lawyers as an "invitee," meaning persons invited to the premises by the owner or occupier for purposes of business or of material interest. It was under that third clause that the plaintiff came in *Miller* v. *Hancock* (2) and in *Indermaur* v. *Dames.* (4)

It is well to keep these principles in mind in considering the subsequent authorities in which *Miller* v. *Hancock* (2) came under consideration. The first of these, *Hargroves, Aronson & Co.* v. *Hartopp* (5), although the judgment appears to depend upon *Miller* v. *Hancock*, may be dismissed upon the ground that the action was one between landlord and

(1) (1868) L. R. 3 C. P. 326.
(2) [1893] 2 Q. B. 177.
(3) [1913] 1 K. B. 398, 410.
(4) L. R. 1 C. P. 274.
(5) [1905] 1 K. B. 472.

tenant and therefore involved a consideration of contractual obligation. That such contractual obligations gave no rise to claims by third parties is old and well-established law and its application is illustrated by the case of *Cavalier* v. *Pope*. (1)

The next authority in order of date is *Huggett* v. *Miers*. (2) The circumstances there were similar to those in *Miller* v. *Hancock* (3), excepting that the accident was due to the staircase being unlit. It was held that the landlord was not responsible for the damage. *Miller* v. *Hancock* (3) was naturally much discussed, and Lord Gorell appears to think that the liability in that case might have arisen owing to the implied agreement by the landlord with the tenant. I have already stated that I cannot accept that view. Lord Moulton confesses to a difficulty in understanding the grounds of that decision, but suggests it was due to the authority conferred by the landlord upon the tenant to issue invitations to people having business on the premises binding the landlord. This also was the view of Farwell L.J., but if the invitation was not clothed with unusual consequences it was unnecessary it should be so inferred, as the facts of the common staircase and open entrance would in themselves, in my opinion, constitute a direct invitation by the landlord.

In *Lucy* v. *Bawden* (4) steps approaching the house were insufficiently fenced from the adjoining area. The steps were in the possession and control of the landlord, but the accident due to this insufficient fencing was held by Atkin J. to be one in respect of which the landlord was not responsible, since the danger was patent and had existed throughout.

His judgment contains the following statement: "On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous disrepair. If

(1) [1906] A. C. 428.
(2) [1908] 2 K. B. 278, 283.
(3) [1893] 2 Q. B. 177.
(4) [1914] 2 K. B. 318, 325.

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he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I see no difference between the use of an unlighted staircase—*Huggett* v. *Miers* (1)—and the use of an unfenced staircase." This is, in my opinion, an accurate statement of the law.

In *Dobson* v. *Horsley* (2) an accident occurred owing to steps in a similar position having a defect in the railing through which a child of the tenant's fell. The defect existed at the date of the demise, and as the law throws upon the landlord no obligation to guarantee the conditions as to safety, through either sanitary or structural defects, of the property he lets, it was held again that the landlord was not responsible. The case of *Miller* v. *Hancock* (3) was once more examined, and Buckley L.J., following it as he was bound to do, classed the obligation in that case as a contractual obligation arising from the implied contract of demise, but he adds that the defective stair was a fact which persons using the staircase were not bound to anticipate, and by allowing the stair to be defective such persons were exposed to a trap. The question as to the trap appears also to form the reason why Phillimore and Pickford L.JJ. accepted the case of *Miller* v. *Hancock*. (3)

In *Dunster* v. *Hollis* (4) the case was one of landlord and tenant, but Lush J. said that he thought the decision in *Miller* v. *Hancock* (3) depended upon contractual obligation and finally decided on that ground, but added that in the circumstances he thought there was a concealed trap.

Two cases in the Scottish Courts (*Kennedy* v. *Shotts Iron Co.* (5) and *Grant* v. *John Fleming & Co.* (6)) appear to accept the wider view and to hold that in circumstances where the landlord retains control and possession of a common staircase

(1) [1908] 2 K. B. 278.
(2) [1915] 1 K. B. 634.
(3) [1893] 2 Q. B. 177.
(4) [1918] 2 K. B. 795.
(5) 1913 S. C. 1143.
(6) 1914 S. C. 228.

his duty to the public is to keep it reasonably safe. Whether such a duty is one that it might be reasonable to impose upon landlords is not a matter which this House has to consider. The question is—does such a duty exist? It may well arise by the implied obligation between the landlord and tenant giving the tenant rights if the obligation be broken, but as between the landlord and the persons who use the staircase for business purposes or because of a material interest no such contractual obligation can be established.

The duty to be sought, therefore, must be found outside contract. This duty does not involve a guarantee as to the safety of premises nor obligation to keep them in repair. Obvious defects, which on the face of them show to any reasonable person that there is danger, do not give rise to liability on the landlord's part, but if the defect, though apparent, gives rise to a danger which is not obvious to a person lawfully using the premises, either on business or having a material interest in their use, and exercising ordinary care and possessing ordinary powers of observation, then the landlord is responsible for any accident that may occur. The degree of danger, and the extent to which it is concealed, may vary from case to case, and its ultimate determination is a question of fact for which a jury is an appropriate tribunal.

In the present case I have found great difficulty in ascertaining what were the facts as determined by the learned judge who tried the case. This, at least, is clear. The appellant, who is the plaintiff in the action, when coming down the common stairs fell at one of the steps which was worn and suffered serious injury. The stairs were made of reinforced concrete, with an iron bar buried in the concrete and running lengthwise along the stair in the middle of its breadth. The concrete had become considerably worn, with the result that although the bar was still covered with concrete, there was a hollow in the concrete behind it and this hollow was not obvious. The caretaker who had charge of the premises never realized that there was danger. It

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was not noticed by the plaintiff, and unless it was negligent of her not to see it, she was guilty of no negligence in what she did. Her heel caught on this iron strip and it was this that projected her down the stairs. The learned judge has held that it was not dangerous and that it was not a trap, but the model of the stair which was before him has been before this House and the facts as I have stated them are the facts upon which his conclusions depend.

I find myself unable to agree.

I think this projecting iron rim was a concealed defect, which constituted a danger that persons with ordinary careful use of the stairs would not notice, for the mere fact that they would see that the stair had been worn would not disclose to them the further fact that the wearing of the stair had caused something to be exposed which could not reasonably be expected and against which a person using ordinary care might very well trip and fall. Had the projection been higher, so that attention might be more readily called to it; had the stair been more worn and more obviously dangerous, it might have been different; but I regard the stair in the condition in which it was exhibited to this House as a stair containing an unexpected danger to people descending the stairs, and in the instance of the plaintiff the danger unfortunately materialised and she fell.

It is pointed out in the evidence that the heels of the plaintiff's boots were $2\frac{1}{2}$ inches high. To the uninformed that might seem excessive, but it is accepted as a medium height, and it was not suggested that the use of these heels was unusual.

I have only to add that the plaintiff was a lodger to one of the defendants' tenants, she had therefore a material interest in the use of the premises and could not be regarded as a mere guest or casual visitor.

For these reasons, therefore, I think that this appeal should be allowed.

LORD ATKINSON. My Lords, the action instituted by this lady, for whom one must feel the keenest sympathy, was an

action of tort. It would be impossible to hold that the owners of the flight of stairs where she met with the accident ever contracted with her that she was to have the right to traverse the stairs remaining in their possession and control, in order to pass to or from the flat in which she was a lodger. When the owner of a flat lets it to a tenant for the purpose of its being resided in by the tenant and his family the landlord must, I think, be taken to have given permission for whatever is reasonably necessary for the reasonable use and enjoyment of the flat for that purpose. This would necessarily include permission to the tenant and his family, his servant, the messengers of the tradesmen with whom he dealt, his visitors and guests and suchlike persons, to have access to his flat in order to enable him and his family to live in it with the customary amenities. It may be doubted whether lodgers were included in the list of privileged persons, since, apparently, it was not contemplated by either landlord or tenant when the letting was made that the tenant should take in lodgers. Whether that be so or not, however, I think it might be held in this case, upon the principle upon which *Lowery* v. *Walker* (1) was decided, that from the user of the stairs for such a length of time as the lady has, to the knowledge of the landlord's caretaker, in fact used them it was to be inferred that she had the landlord's permission to use them. She was undoubtedly, when using the stairs, using them as the invitee of the tenant, though not of the landlord. Quoad the landlord she was, I think, when using them at most merely his licensee. There is nothing in the case to support the suggestion that the tenant was authorized by the landlord to act as the latter's agent to invite her. The landlord gave her no invitation, it would appear to me, either direct or indirect, to use these stairs.

As between the plaintiff and the tenant she had no doubt an interest, as he had, in her occupation of his flat and in the using these stairs to enable her to occupy it with his family. But the landlords, the defendants, were no parties to this arrangement. They gained nothing by her becoming the

(1) [1911] A. C. 10.

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lodger of the tenant. She did not traverse these stairs, either when ascending or descending, to do any business with or for the landlords, or to discharge any duty she owed them by contract or otherwise. There is not even any evidence that the tenant, by taking the plaintiff as a lodger, was thereby helped to pay the landlord his rent or to discharge any duty he owed to the landlord. The plaintiff, being only a licensee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known. He owed a duty to her not to lay a trap for her. But even if the plaintiff was in the position of an invitee of the defendants, her rights and duties in that character would be those described and measured by the well-known passage from Willes J.'s judgment in *Indermaur* v. *Dames*. (1) The findings of fact of the learned judge who tried the case, Shearman J., disentitled her, in my view, to any relief either in the character of licensee or in that of invitee of the defendants.

The passage referred to has, I think, for the last fifty-six years been accepted as a full and accurate statement of the law. It runs as follows: "The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact. . . . . It was ably insisted for the defendant that he could only be bound to

(1) L. R. 1 C. P. 274, 288.

keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business."

The learned judge finds: (1.) That the treads of the stairs were originally made of cement and that underneath the cement were placed pieces of iron on each tread; that the cement was gradually worn away, with the result that on many treads these small rectangular bars came to the surface. (2.) That there was evidence that where the plaintiff fell two stairs were particularly worn. (3.) That the plaintiff for eighteen months had been regularly up and down these stairs. (4.) That there was no negligence on the part of the landlord or of the caretaker in not observing the condition of the stairs, reporting it and getting them repaired. (5.) That hundreds of people passed up and down these stairs, and that no complaint was made to anybody as to their condition. (6.) That on the particular morning when the accident occurred, the plaintiff when, in her descent, she came to put her foot on the tread mentioned, caused her heel to catch in a depression on the tread and fell. (7.) That she looked and saw the hole in the step after she had fallen, not apparently before. A model was made which he finds shows accurately the nature and extent of this depression. (8.) He then finds she fell where she did owing to the particular stair being out of repair.

Then occurs this passage: "When this lady descended in daylight and her foot got into that depression, which, if she did not notice, she could have substantially noticed for months before, I am satisfied it was in the same state. What has really happened was that it has gradually worn out. There are no signs that there has been a collapse of anything, or that the staircase was wrong, but it has gradually been worn out by kicking and thumping and pressing; that is to say, it has been scooped or hollowed out in the middle of the step by pressure. It may have happened that this lady had

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gone up and down the stairs and had not noticed what had happened, but it was just as open for her to see it as for the caretaker to see it."

(9.) He then finds there was no negligence on the landlords' part, nor on that of the caretaker, in not seeing it and getting the tread repaired, and then says that "beyond the fact that the plaintiff went up and down the stairs without seeing this, I do not impute any negligence to her." To his mind he says it was perfectly clear she fell down owing to a depression, or owing to the wear and tear of the stair—a thing which was perfectly obvious to anybody walking up or down the stairs. That I think must mean that the accident was not caused by any unusual covert, concealed or hidden danger, but by a danger observable by any person who chose to look at the stairs he or she was treading. It is not suggested there was not plenty of light to enable her to see the condition of the stair if she had looked. (10.) Lastly the learned judge finds that no complaint was made by any of the defendants' tenants that this staircase was out of repair, nor did he think he could possibly find that the staircase as a whole or that this particular place could be described in plain English as dangerous.

The expression that the stairs were not dangerous appears to me necessarily to imply that they might be ascended or descended in safety by a person of ordinary powers of observation, using ordinary care. The plaintiff has admittedly on these findings not used reasonable care for her own safety within the meaning of the passage I have quoted from *Indermaur* v. *Dames*. (1) Neither have the defendants either directly or by their servant failed to take reasonable care to prevent damage from some unusual danger. There was no unusual danger according to these findings. Any one who looked could see the condition of the stairs. Judged by the tests Willes J. prescribed, the appeal must, I think, fail.

But it is contended, not without some justification, that the case of *Miller* v. *Hancock* (2) supplies an entirely different test and that judged by it the plaintiff's case should succeed.

(1) L. R. 1 C. P. 274. (2) [1893] 2 Q. B. 177.

That case has been much criticised. Many judges have sought to explain it so as to bring it into agreement with *Indermaur* v. *Dames* (1), relying on the fact that the staircase upon which the plaintiff fell constituted the only means of approach to offices on different floors of the house. It was in the possession of and under the control of the landlord. The plaintiff's masters, a railway company, sent him to a firm having their offices on the second floor of the house to transact on their behalf some business for them—namely, to collect some debts due by the firm to the company whose employee he was. It would appear to me that the plaintiff was very much in the same position in all essentials as was the plaintiff in *Indermaur* v. *Dames.* (1) He met with an accident, fell down these stairs, was injured and sued for damages. The jury found that the stairs were in an unsafe condition, and that this condition caused the accident. The facts are rather scantily stated in the report in the Court of Appeal. Nothing is said as to whether the defendant knew or ought to have known of the unsafe condition of the stair, or whether he took any reasonable care to prevent damage coming from this danger, or whether the danger was of an unusual character, or again whether the plaintiff on his part took reasonable care for his own safety.

I cannot think that the Court of Appeal could have intended to treat these matters, vital according to the decision in *Indermaur* v. *Dames* (1), as irrelevant. However, from the language used by Lord Esher and Bowen L.J. (as he then was), it would appear as if they desired to lay down that there was an absolute duty on the landlord of such premises as these to provide approaches to the different floors reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants. The peculiarity of this decision is that both these learned judges apparently expressly base it upon an authority which does not at all support the wide propositions above mentioned. That authority is *Smith* v. *London and St. Katharine Docks Co.* (2)

(1) L. R. 1 C. P. 274. (2) L. R. 3 C. P. 326.

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That case is, when properly considered, one of the cases not very happily styled trap cases. It is a good example of an unusual or covert danger, of which the plaintiff knew nothing, but of which the defendants were by their servants well aware, causing injury to the plaintiff, although he had taken reasonable care under the circumstances to protect himself. It is entirely reconcilable with *Indermaur* v. *Dames*. (1) The facts are these. The docks company supplied for service a gangway to enable people having business with the officers of a ship called the *Murray* to go on board her. This gangway as first placed was properly constructed and safe. The plaintiff passed over it, boarded this ship, transacted his business, and was in the act of returning when it fell and he was injured. What brought about the fall was this, that the servant of the dock company, while the plaintiff was on board the ship, in order to let some other ship pass, changed the position of the gangway from the safe position in which it was first placed to a new and perilous position. The dock servant knew that in its new position the gangway was unsafe. The jury found that the plaintiff was not guilty of any negligence, which I suppose must mean that, so far as he knew the position of things, he took reasonable care for his own safety. Byles J. winds up his judgment thus (2): "The plaintiff had gone on board the ship by the invitation of one of the ship's officers, not as a mere guest, but on business, and he had actually done business on board the ship. I think, therefore, that there was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it." I fail to see how the Court of Appeal in *Miller* v. *Hancock* (3) succeeded in finding in this case any support for the wide proposition as to the landlord's duty, which, if their language be taken literally, they undoubtedly laid down. I have read most carefully *Lucy* v. *Bawden* (4), *Dobson* v. *Horsley* (5), *Hart* v. *Rogers* (6), and *Dunster* v. *Hollis*. (7) In each of these, notably in the

(1) L. R. 1 C. P. 274.
(2) L. R. 3 C. P. 333.
(3) [1893] 2 Q. B. 177.
(4) [1914] 2 K. B. 318.
(5) [1915] 1 K. B. 634.
(6) [1916] 1 K. B. 646.
(7) [1918] 2 K. B. 795.

first, *Miller* v. *Hancock* (1) is criticised. The result of all these criticisms seems to be this: If the judgment of the learned judges who decided it cannot be interpreted so as to bring it into harmony with the judgment of Willes J. in *Indermaur* v. *Dames* (2) the decision must be rejected as erroneous, and the latter authority will still be taken as the ruling authority on the point. I heartily concur in this conclusion. For the reasons I have already given, I think this appeal fails and should be dismissed.

LORD SUMNER. My Lords, Shearman J., though he does not use the word "trap," to my mind, clearly meant that the facts did not raise that kind of liability on the part of occupiers or controllers of premises toward persons coming on to them with their permission, express or implied, which is commonly so called. The stairs were well lighted and, after slipping, the plaintiff looked and saw the cavity in the step. She could equally have seen it, and have seen it equally well, if she had looked before she slipped. She was fully familiar with the stairs. The spot was not a dangerous spot. The cavity was substantially in the same condition in which it had been for a long time. She slipped because she caught her heel, and not because the step or anything in it was slippery at the moment. These are, in effect, the learned judge's findings, and the evidence of the model, which he found to be exact, entirely supports them. There is no misapprehension of the law to be urged against his conclusion. There is not even a finding that the stairs were not reasonably fit for their purpose, though to the extent mentioned they were out of repair.

My Lords, I think the learned judge's findings should be accepted. The cavity does not become a concealed defect by having its front perpendicular instead of being uniformly dished out both back and front, and this is the only result of the existence there of the iron bar. I know of no law which entitles us to say that, with ordinary care, a person who saw the defective step in front of her would see the cavity and not

(1) [1893] 2 Q. B. 177. (2) L. R. 1 C. P. 274.

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see the perpendicular front edge of it. In law I think that, if the place is plainly visible, as it was, the plaintiff, being in full possession of her faculties, was bound to look after herself, as she had always done before. If on that day she was tripping down, I do not say carelessly but free from care, and did not appreciate what was there for her to see, this cannot in itself impose liability on the occupiers or warrant a dissent from the trial judge's conclusions of fact. The defendants cannot be made liable merely because the plaintiff on this particular morning did not realize the effect of what she saw.

My Lords, I think that the plaintiff was the defendants' licensee not their invitee. Somebody builds the stairs, and the defendants open the door, but the tenant gives the invitation. It was not about the landlord's business that the plaintiff used the stairs, though it may well be that, as a lodger to whom the tenant was seemingly entitled to sub-let a room, she had such a right to go in and out as to make her licence irrevocable, so long as she remained a lodger. In this particular case, however, it makes no difference to the liability whether she was the defendants' licensee or their invitee. Under the present circumstances the obligation was only not to lay a trap for her, and none was laid.

The remaining question is whether the plaintiff can succeed on *Miller* v. *Hancock*. (1) If that was only a trap case, she cannot; if it correctly lays down the law of tort, as regards the duty apart from traps of an occupier or other person having the control of a common stair towards a person lawfully using it, then she can.

There are six reports of *Miller* v. *Hancock* (1) in the Court of Appeal; those in the Law Reports, in The Reports, and in the Times Law Reports, the Law Times, the Weekly Reporter, and the Justice of the Peace. Except that the Law Times says that Miller was going up, and all the rest say that he was coming down, they do not materially differ. None use the word "trap"; none say anything about the light, and the step is not more fully described than to say that "a

(1) [1893] 2 Q. B. 177; 4 R. 478; 9 Times L. R. 512; 69 L. T. 214; 41 W. R. 578; 57 J. P. 758.

hollow had been worn in the surface of the stone." (1) In the Weekly Reporter (2) Bowen L.J. says that the plaintiff "slipped."

By the courtesy of the Record Office I have examined the original pleadings and had better quote the material parts. The writ is indorsed for damages sustained "whilst lawfully using the staircase of Defendant's premises . . . . which the Defendant had negligently allowed to remain in a dangerous state of non-repair." The statement of claim says: "1. Defendant was the owner or landlord of the premises, which he lets to tenants . . . . and was the person responsible for any necessary repairs to and for the safe condition of the stairs. 2. The Plaintiff, while lawfully using the said stairs, suffered damage from personal injuries owing to the negligence of the defendant, his servants or agents, in causing or allowing the said stairs to be out of repair and in a defective and unsafe condition by reason of which . . . ."

The defence, in addition to traverses, pleaded that the defendant: "1. Denies that he was responsible for the necessary repairs or safe condition of the stairs as landlord or otherwise. 2. Does not admit that the plaintiff was lawfully using the stairs. He was not using the stairs at the invitation or with the permission of the defendant or of any person to whom the defendant was under any liability in respect of the condition of the said stairs. . . . . 7. The statement of claim does not show any breach of duty on the part of the defendant towards the plaintiff."

The plaintiff then delivered a reply as follows: "2. The plaintiff says that the said stairs were there for the purpose of being rightfully and lawfully used by the public or persons resorting to the different offices or places of business on the premises, and the defendant was under a liability to have the condition of the said stairs reasonably safe for such persons, of whom the plaintiff was one."

To this the defendant rejoined that the reply was a departure from the statement of claim, "being based upon the supposed breach of a different duty from that alleged in the

(1) 69 L. T. 214. (2) 41 W. R. 578.

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statement of claim," and that the facts therein set forth afforded no answer to para. 2 of the defence.

Bray J. who was counsel for the defendant in *Miller* v. *Hancock* and remembers the case very well, has been so good as to assist me in every way possible, and although, after making inquiry, he finds that no note of the trial can be discovered, his own recollection is clear—namely, that the plaintiff never put forward the case that the defective stair was a trap, but contended that "as between the landlord and his tenant there was an implied obligation on the landlord to keep the staircase in repair, and that out of that there arose a duty on the part of the landlord towards all persons lawfully coming to see the tenant, to maintain the stairs in a reasonably safe condition." This at once explains the argument addressed to the Court of Appeal for the appellant—namely, that, in the absence of express terms in the lease making it the obligation of the landlord to repair the stairs, the tenant must do any repairs that were needed and no implied obligation upon the landlord's part could arise. It also explains why the plaintiff, having been driven by the defence from his first loose case—namely, negligence and non-repair—was careful, when he replied that he was lawfully resorting to the tenant's office, not to go on to say that the defect was one highly dangerous to persons like himself, who were unacquainted with the premises, as the defendant well knew: *Indermaur* v. *Dames* (1), but, wittingly or not, pleaded virtually in the terms of the declaration in *Gautret* v. *Egerton* (2), which was held bad.

If then *Miller* v. *Hancock* (3) is not a case of a trap, but decides that an owner of property is liable contractually to others than parties or privies, or non-contractually is under a duty to repair, even though the want of repair is patent, it is inconsistent with the authorities cited, to which, except to name *Cavalier* v. *Pope* (4), it is not necessary for me to refer. I agree that the appeal fails.

LORD WRENBURY. My Lords, in this case the plaintiff, who was injured, was a lodger in a flat of which her brother-

(1) L. R. 1 C. P. 274.
(2) (1867) L. R. 2 C. P. 371.
(3) [1893] 2 Q. B. 177.
(4) [1906] A. C. 428.

in-law and his wife (who was the plaintiff's sister) were tenants. The plaintiff had lived there for eighteen months, and during that time had been regularly up and down the stairs. Two of the stairs were worn in a manner which I need not describe again. The learned judge found as a fact that she fell owing to those particular stairs, or one of them, being out of repair. He also found as facts: (1.) that there was no negligence on the part of the defendants in allowing the stairs to be in the condition in which they in fact were; (2.) that beyond the fact that the plaintiff went up and down the stairs without seeing the defect, there was no negligence on her part; (3.) that the staircase was not dangerous; and (4.) that the depression, owing to wear and tear, was perfectly obvious to anybody walking up or down the stairs. The question is whether the plaintiff can recover against the lessor of the flat.

It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue. There was no contractual relation. She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the tenant and all persons lawfully resorting to the tenant's premises. She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord.

The position as between the owner of premises and a licensee is that permission is given to come upon the premises, such as they are, and the licensee must take them as they are. The owner of dilapidated premises may demise them as they are: *Cavalier* v. *Pope* (1): "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house." Per Erle C.J.: *Robbins* v. *Jones* (2), approved by Lord Macnaghten in *Cavalier* v. *Pope*. (3) The licensee must

(1) [1906] A. C. 428.
(2) (1863) 15 C. B. (N. S.) 221, 240.
(3) [1906] A. C. 430.

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take the premises as he finds them ; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious." Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them. For instance : if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has generally been called "a trap," although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him. He was entitled to assume there was no such danger. An instance of such a case is afforded by *Indermaur* v. *Dames* (1) : the gasfitter was entitled to assume that the floor was throughout covered by flooring boards. There was an unfloored opening left at the entrance to a shaft, and it was not fenced. A workman habitually employed on the premises would probably have failed to recover. The gasfitter recovered, the jury having found

(1) L. R. 1 C. P. 274.

that he was not negligent. In such a case the question whether the plaintiff was negligent or not is one of fact.

I make these observations for the purpose of testing the learned judge's finding that upon the facts proved this danger, such as it was, was obvious. He says it was perfectly obvious to anybody walking up or down the stairs. It is not necessary to go as far as this. To this plaintiff, who had used the stairs for eighteen months, the depression in the stair, the progressive wear of the stair, the gradual tendency of the iron bar embedded in the cement to become exposed, the learned judge could well find, and I think he meant to find, to be obvious. A perfect stranger who had never used the stair before might—I do not say he would—have stood in a different position. This plaintiff cannot, I think, enjoy that advantage. I can find here no concealed danger, and in its absence the plaintiff cannot recover, unless *Miller* v. *Hancock* (1) decides a great deal more than I think it does decide, and unless your Lordships think it is right in so deciding.

In *Norman* v. *Great Western Ry. Co.* (2) and *Dobson* v. *Horsley* (3), I have already in the Court of Appeal commented upon *Indermaur* v. *Dames* (4) and *Miller* v. *Hancock* (1), and the subsequent decisions. To that which I there say I now, sitting in this House, desire to add that *Miller* v. *Hancock* (1) was, in my judgment, wrongly decided, unless there is to be added as a fact that which I cannot find in the report—namely, that there was a concealed danger, by which I mean a danger that was, or ought to have been, known to the lessor, and which the licensee, using reasonable care, would not have discovered. Concealed danger is not to be found in the report, but it is possible that it is to be inferred from the fact that both Lord Esher and Bowen L.J. expressed themselves as following *Smith* v. *London and St. Katharine Docks Co.* (5), a case in which Bovill C.J. relied on the fact that the defendants knew that the gangway was dangerous, but that the plaintiff did not. However this may be, *Miller* v. *Hancock* (1), I

(1) [1893] 2 Q. B. 177.
(2) [1915] 1 K. B. 584.
(3) [1915] 1 K. B. 634.
(4) L. R. 1 C. P. 274.
(5) L. R. 3 C. P. 326.

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think, was wrong, unless concealed danger is added as a fact.

I place no great reliance upon the finding of the learned judge that the staircase could not be "described in plain English as dangerous." He finds that, in fact, the plaintiff fell owing to the particular stair being out of repair, and that being so I think he can have meant no more than that a person who recognized its condition could have used it in perfect safety. And this, I think, is obviously the fact. In order to recover the plaintiff, I think, must sustain the proposition that there was a danger there which she did not know, and as a reasonable person using reasonable care would not know. She does not, I think, satisfy the affirmative of this proposition. The facts and the findings all point the other way. The appeal must, I think, be dismissed with costs.

LORD CARSON. My Lords, I agree with the conclusion arrived at by my noble and learned friend, Lord Buckmaster, and I am of opinion that this appeal should succeed.

It is unnecessary for me, after the exhaustive examination of the authorities which has already taken place in the speeches of your Lordships, to say more than this—that I concur in the view that the case of *Miller* v. *Hancock* (1) can only be supported if you add as a fact that which is not to be found in the report—namely, that there was a concealed danger, or what has been compendiously called "a trap." The duty, in my opinion, of the landlord, who retains control and possession of a common staircase, is a common law duty, and it cannot be put higher than this, that he is bound to maintain it in such a condition that those who are invited to use it will not be exposed to any dangers which cannot be avoided by the exercise of ordinary care.

The question, therefore, in the present case depends upon the conclusion to be come to in the facts as to how the present accident occurred and whether it was caused by a condition of the staircase which was not obvious and which the plaintiff could not have detected by the use of ordinary care.

(1) [1893] 2 Q. B. 177.

I think there is little doubt as to how the accident happened. It is clear that there was a depression of the stair which was obvious. The stairs, however, being made of reinforced concrete with iron strips running across them, became gradually worn down until a portion of the concrete had been "scooped or hollowed out," to use the words of the learned judge who tried the case, until there was a sufficient cavity to cause her heel to catch on this iron strip. This defect would be caused by a gradual process, and although it is true that the plaintiff had been using these stairs for several months, I do not think there was any negligence to be imputed to her in not seeing the danger which had arisen by reason of this gradual wearing out of the concrete, which caused the bar to become a danger. I think, therefore, for the reasons I have stated, the plaintiff is entitled to succeed in this action.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, Nov. 3, 1922.

Solicitors for the appellant: *Lewis Barnes & Co.*
Solicitors for the respondents: *White & Leonard.*

[PRIVY COUNCIL.]

J. C.* 1922 Oct. 23.

CLARKSON AND ANOTHER . . . . . APPELLANTS;

AND

DAVIES AND OTHERS . . . . . RESPONDENTS.

[AND CONSOLIDATED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Company—Directors—Sale of Assets—Undisclosed Payment to Directors—Action against Directors—Parties—Constructive Trust—Limitations Act (R. S. Ont., 1914, c. 75), s. 47.

Under an agreement between two companies, ratified by the shareholders on June 29, 1902, all the assets of company A were sold to company B, there being issued to shareholders in company A stock in company B to the amount of a detailed valuation of the assets. At the same time $30,000 were paid by company B to the directors of company A; this transaction not being disclosed to company A or to the shareholders in either company. In 1919 and 1920 actions were brought against the directors to recover the $30,000. The plaintiffs included (*a*) the liquidator of company B, (*b*) a person suing on behalf of himself and all other shareholders in company A, and of all shareholders in that company prior to June 29, 1902, who transferred their shares pursuant to the agreement. Company A was not made a party to the actions:—

Held, (1.) that the payment to the directors could not be justified as compensation for loss of their directorships, in the absence of a full disclosure of the facts: *Kaye* v. *Croydon Tramways Co.* [1898] 1 Ch. 358 applied, (2.) but that the actions could not be maintained. The liquidator could not sue, because no claim had been made and transferred to company B, and that company was not a shareholder. The claim as representing the shareholders failed because, if company A existed, it was a necessary party; if it did not, there was no claim. The claim as representing the shareholders on June 29, 1902, failed, because the directors acted as agents for the company and not for the shareholders.

Held, further, that in any case the actions were barred by the Limitations Act (R. S. Ont., 1914, c. 75), since they were based upon breach of a constructive trust within the meaning of the exception to s. 47 of that Act.

Taylor v. *Davies* [1920] A. C. 636 followed.

Judgments of the Appellate Division affirmed.

CONSOLIDATED APPEAL from a judgment (June 14, 1921) of the Supreme Court of Ontario, Appellate Division,

* *Present:* VISCOUNT CAVE, LORD PHILLIMORE, LORD JUSTICE-CLERK, and MR. JUSTICE DUFF.

affirming and reversing respectively two judgments of Lennox J. (October 9, 1920).

The two actions giving rise to the present appeal were brought against the respondents in 1919 and 1920 respectively. The circumstances in which the actions were brought and the various plaintiffs (now appellants) appear from the judgment of the Judicial Committee.

The effect of the judgment appealed from was to dismiss both actions, save so far as in the first action judgment had been given against the defendant Davies in default of appearance.

1922. July 24, 25. *Clauson K.C.*, *J. W. Bain K.C.*, *E. Bristol* and *P. le Breton* for the appellants. The payment to the directors amounted to a bribe and was fraudulent. It cannot be justified as being compensation to them for the loss of their offices, in the absence of any disclosure of the facts to the vendor company or the shareholders: *Kaye* v. *Croydon Tramways Co.* (1); *Parker* v. *McKenna.* (2) The payment being fraudulent, the action is not barred by limitation; it is not necessary to prove a case of active concealment, if the person defrauded remains in ignorance: *Metropolitan Bank* v. *Heiron* (3); *Bulli Coal Mining Co.* v. *Osborne* (4); *Oelkers* v. *Ellis.* (5) An illegal payment of this character is ultra vires, and not capable of ratification: *Oram* v. *Hutt* (6); *Preston* v. *Liverpool, &c., Ry. Co.* (7); *Earl Shrewsbury* v. *North Staffordshire Ry. Co.* (8) The actions being founded on fraud and fraudulent breach of trust *Taylor* v. *Davies* (9) does not apply; in that case only the second exception to s. 47 of the Limitations Act (R. S. Ont., 1914, c. 75) was construed. The Provincial Company having ceased to exist, the present claim can be based upon the shareholders' rights to a distribution of the assets, without joining the company: *General Exchange Bank* v. *Horner.* (10)

(1) [1898] 1 Ch. 358.
(2) (1874) L. R. 10 Ch. 96, 118.
(3) (1880) 5 Ex. D. 319.
(4) [1899] A. C. 351.
(5) [1914] 2 K. B. 139.
(6) [1914] 1 Ch. 98.
(7) (1856) 5 H. L. C. 605.
(8) (1865) L. R. 1 Eq. 593.
(9) [1920] A. C. 636.
(10) (1870) L. R. 9 Eq. 480.

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The whole of the assets of the Provincial Company having passed to the Dominion Company, the latter company, which was no party to any turpis causa, can sue. The judgment of the Board in *Allen* v. *Hyatt* (1) supports the view that the directors owed a duty to the shareholders as well as to the company. Under r. 39 of the Rules of the Supreme Court the interlocutory judgment did not bar the right to proceed against the other defendants.

McMaster K.C. for the respondents, other than Deacon: *Tilley K.C.* for the respondent Deacon. Judgment was recovered against Davies in the first action in which there was a claim on behalf of the shareholders. Rule 39 does not justify a separate action, as the second action is against the same defendants. Except therefore for the claim by the liquidator of the Dominion Company, neither action can now be maintained: *King* v. *Hoare* (2); *Kendall* v. *Hamilton* (3); *Goldrei, Foucard & Son* v. *Sinclair.* (4) Further, if the Provincial Company existed when the actions were brought, no claim as representing the shareholders would lie without the company being a party: *Coxon* v. *Gorst* (5); *Spokes* v. *Grosvenor Hotel Co.* (6) If the company was dissolved no claim survived: *Hastings Corporation* v. *Letton* (7); *In re Higginson and Dean.* (8) The Provincial Company was non-existent, because the agreement provided that from the date of the assent all the shares were to be deemed to be surrendered. The action by the liquidator cannot be maintained; no claim in respect of the transaction formed part of the assets which passed to the Dominion Company, and that company was not a shareholder in the Provincial Company. In any case the actions are barred by the Ontario Limitations Act. If there was ever any trust it arose out of the transaction itself, and was therefore a constructive trust within s. 47 of that Act: *Taylor* v. *Davies.* (9)

(1) (1914) 30 Times L. R. 444.
(2) (1844) 13 M. & W. 494.
(3) (1879) 4 App. Cas. 504.
(4) [1918] 1 K. B. 180.
(5) [1891] 2 Ch. 73.
(6) [1897] 2 Q. B. 124.
(7) [1908] 1 K. B. 378.
(8) [1899] 1 K. B. 325.
(9) [1920] A. C. 636.

Clauson K.C. in reply. A claim for a breach of a fiduciary relationship is joint and several: *Blyth* v. *Fladgate.* (1) There was therefore no merger of the causes of action in the judgment against Davies.

Oct. 23. The judgment of their Lordships was delivered as follows (2) :—

The transactions which gave occasion for the two actions in which these appeals have been taken originated and were completed in 1902. The two actions were raised one on August 6, 1919, and the other on March 15, 1920, after an interval of seventeen or eighteen years subsequent to the occurrence of the cause of action.

In 1902 it was arranged that the Provincial Building and Loan Association (hereinafter called the Provincial Association) should sell its assets and undertaking to the Dominion Permanent Loan Company (hereinafter called the Dominion Company). The Provincial Association (the vendor company) had been incorporated in 1891, and the Dominion Company (the purchasing company) had been incorporated in 1890. The terms of the arrangement were set out in an agreement between the Provincial Association and the Dominion Company dated April 2, 1902. It was declared that the agreement was not to "be deemed to be an agreement for the union merger or amalgamation" of the two companies, but an agreement for the purchase and acquisition by the Dominion Company of the assets and undertaking of the Provincial Association. As and for the consideration for the said sale, the Dominion Company were to allot and issue to the shareholders of the Provincial Association permanent stock of the Dominion Company at par, fully paid up and non-assessable, for an amount exactly equal to the net value of the assets of the Provincial Association, as the same should be valued and ascertained as after mentioned in the said agreement, less the amount of debts, liabilities and obligations of the

(1) [1891] 1 Ch. 337.

(2) The judgment was stated to have been prepared by the Lord Justice-Clerk (Lord Scott Dickson) who died before its delivery—namely, on August 5, 1922.

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Provincial Association. The completion of the sale and purchase was defined to be the assent to the said agreement by the Lieutenant-Governor in Council. This assent was duly given on June 25, 1902.

The agreement was contingent upon being ratified and confirmed by the shareholders of each of the said companies; it was duly ratified and confirmed by the shareholders of the said companies on June 18, 1902.

The valuation of the Provincial Association's assets was to be made by two valuers, who were not to fix a lump sum, but were to value "each and every such assets," all such values being deemed to be the cash market value of each of such assets as at the date of valuation. By the agreement it was further provided that the Provincial Association should pay $5000 in full of its share of the costs of carrying out the agreement to completion, which was to be deducted from the purchase price, and the Dominion Company was to pay all such costs over and above the said $5000.

The purchase was carried out in terms of the agreement of April 2, 1902. That is to say that, so far as was disclosed to either of the said companies or the shareholders thereof, the whole terms of the said purchase and sale were contained in the said agreement of April 2, 1902, which agreement was duly carried out.

It was, however, about the same time arranged between the defendants, the directors of the Provincial Association, and Mr. Holland, the managing director of the Dominion Company, that a further payment of $30,000 beyond anything provided for or disclosed in the said agreement of April 2, 1902, should be made out of the funds of the Dominion Company to the said directors of the Provincial Association. This payment of $30,000 was made by Mr. Holland, managing director of the Dominion Company, to Mr. Davies, managing director of the Provincial Association, who primarily retained $18,000 thereof to himself, and distributed the remainder of $12,000 among the other defendants, his co-directors of the Provincial Association, in varying sums, as had been arranged among themselves. Out of the said

$18,000, Mr. Davies paid $1000 to the auditor of the Provincial Association. The said payment and distribution were made in July and August, 1902.

No disclosure as to this $30,000 was made by the defendants or any of them to the Provincial Association or the shareholders thereof, except, as after mentioned, to Miss Hancock. On the contrary, all the defendants combined to prevent it from becoming known, and they appropriated the whole $30,000 to themselves. Nothing was included in the valuation of the assets of the Provincial Association for or in respect of the said $30,000, or any claim in respect thereof, the defendants' concealment as to this being for a time entirely successful.

On February 14, 1903, Mr. A. B. Cunningham, a shareholder in the Provincial Association, issued a writ of summons which, as amended, was addressed to the Dominion Company, the Provincial Association and the five directors thereof, in which the plaintiff's claim was to set aside the agreement of April 2, 1902, approved on June 18, 1902, as being illegal and fraudulent. The Dominion Company, the Provincial Association, and the directors of the Provincial Association, other than Mr. Davies, entered appearance in the said action. The statement of claim for Cunningham, the plaintiff in the said action, was based on an averment of an illegal and fraudulent and secret agreement between the Dominion Company and the managing director of the Provincial Association, by which the former agreed to pay a substantial sum of money to the latter in order to facilitate the carrying out of the agreement of April 2, 1902.

In their statements of defence to that action the Provincial Association and the Dominion Company pleaded (inter alia) that the Provincial Association had ceased to exist as a corporate body, and was an extinct corporation. After sundry proceedings in that action, it was settled on terms including a money payment by certain of the defendants to the plaintiff, and the action was of consent dismissed on September 18, 1903, by an order of the Local Master. In the course of the said proceedings it appeared that one of the grounds on which the

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said action was based was the said transaction relating to the payment of the said $30,000, the facts relating to which seem to have been in most material respects disclosed by the proceedings in the said action.

Thereafter, on September 28, 1904, another writ of summons was issued by Samuel Salton as plaintiff against the Dominion Company, the Provincial Association, the said directors of the latter association, and certain directors of the Dominion Company, claiming (inter alia) that the Dominion Company and the said directors of the Provincial Association should pay the said $30,000 to the Provincial Association. Another and similar action appears at or about the same time to have been raised or threatened by some person called Hunter against the same defendants. Salton's action was a class action in which he sued on his own behalf and on behalf of all shareholders of the Provincial Association. These actions were also compromised and settled in or about September, 1905, by certain payments made by or on behalf of certain of the defendants therein. Thereafter nothing further was done in the matter till the two actions were raised in which the present appeals to this Board were taken.

On March 15, 1920, the trial judge ordered that these two actions should be consolidated, but the Supreme Court, on April 19, 1920, set aside this order. Thereafter the two actions proceeded before the same trial judge, the evidence in the first action being accepted as evidence also in the second, the trial of the second action being held immediately after the trial of the first action, and both actions were disposed of by the trial judge (Lennox J.) on October 9, 1920, when he dismissed the first action as against the defendants other than the defendant Davies. As to Davies, no appearance having been entered for him, default judgment was pronounced on January 3, 1920, for damages to be assessed. In the second action the trial judge ordered and adjudged that the plaintiffs do recover from the defendants $57,319.85.

In the Appellate Division both actions were heard and disposed of together on June 14, 1921. The appeal in the first action was dismissed with costs, and in the second action

the Appellate Division allowed the appeal and set aside the said judgment of the trial judge. The present appeals have been taken to this Board against these judgments of the Supreme Court. It will be necessary to consider and deal with the two actions separately. But the following observations are applicable to both actions.

As to the merits or substance of the $30,000 transaction, the trial judge expressed himself thus: "The consideration stated in the deed of transfer was not the full or true consideration for the sale and transfer of the assets and rights of the association and its shareholders. There was an additional consideration of $30,000 secretly bargained for and obtained by these five directors. Knowledge of the true consideration was intentionally and studiously concealed from the shareholders of the association, and the approval of the shareholders other than these five accredited agents —and the sanction of the Attorney-General of the Province were obtained by the false and fraudulent representation of these directors as to the nature and character of the transaction. The directors were thereby enabled to obtain, and did secretly obtain and appropriate to themselves, $30,000, the property of the shareholders of the association. There is no shadow of doubt about the facts, and the facts establish a plain vulgar case of false representation, followed by misappropriation. It was not merely a failure to disclose the truth: the defendants were careful to prevent the shareholders from knowing the terms upon which the transaction was actually being carried out." Later on, the same learned judge, in his opinion, says: "The directors conspired together to wrongfully and secretly divert and appropriate to themselves, and did in fact and in law, and in breach of their duty as agents of the association, wrongfully appropriate the entire cash consideration paid by the Dominion Permanent for the transfer spoken of, to wit, the sum of $30,000."

In giving the reasons for the judgment of the Appellate Division, Meredith C.J., in dealing with the payment, receipt and apportionment of the said $30,000, says: "Davies and the other of these gentlemen" (i.e., the said five directors

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of the Provincial Association) "lost their offices as a result of the sale; it was reasonable for them to ask and to receive compensation for the loss of their positions, and it was on this basis that the money they received from Davies was paid to them. I venture to think that the usual course in such a transaction as was entered into is to compensate officers who are deprived of their positions as the result of it, and, in my view, the amounts allowed as compensation in this case were reasonable." Later on, he adds: "It is difficult, if not impossible, for me to imagine that the shareholders did not know that it would be necessary to provide this compensation."

In the proceedings before this Board neither of the learned counsel, who represented the respondents, seriously challenged the views as above expressed by the trial judge, or supported the grounds above quoted from the opinion of the learned Chief Justice. In so acting, this Board think counsel exercised a wise discretion. On this point of controversy, without accepting it as textually in all respects accurate, they think the opinion of the trial judge was in substance sound.

Their Lordships cannot assent to the views given expression to on this part of the case by the learned Chief Justice. A necessary basis, in the opinion of this Board, for a payment of compensation such as he describes is that there should be a full and complete disclosure to the parties interested of all the main facts: *Kaye* v. *Croydon Tramways Co.* (1) Here there was not only no attempt to make such a disclosure, but there was, on the contrary, a concealment of the facts.

Coming now to a consideration of the two actions separately, the first action was brought by the liquidator of the Dominion Company and Miss Hancock, suing on behalf of herself and all other shareholders of the Provincial Association, and the only defendants are the four surviving directors of that association and the executors of the deceased director. The Provincial Association was not a party to the action. Dealing, in the first place, with the position of Mr. Clarkson, the liquidator of the Dominion Company

(1) [1898] 1 Ch. 358.

the statement of claim is far from clear. All that is said about Mr. Clarkson is that he is liquidator of the Dominion Company. It is further said (para. 3) that the Dominion Company agreed to purchase the assets of the Provincial Association, and to pay, as they did subsequently pay, to the defendants $30,000 as a bribe for approving of the said purchase as directors of the Provincial Association By para. 4 of the said statement of claim, it is said that the $30,000 was paid by the Dominion Company as a bribe to the said directors of the Provincial Association, and was wrongfully accepted by the said directors as a bribe, and in breach of their fiduciary relations to the Provincial Association. By para. 5 of the said statement of claim, it is said that the fact of the payment of the said bribe was concealed by the directors of the Dominion Company and of the Provincial Association "from its shareholders" until, in the course of the liquidation of the Dominion Company in 1918, the facts were ascertained by the liquidator. The plaintiffs' claim is for a decree against the defendants jointly and severally for $30,000, with interest from April 2, 1902.

The whole of the payments making up the $30,000 paid by the Dominion Company appear to have been duly entered in the books of that company, and they were all made subsequent to June, 1902. The valuation of the assets of the Provincial Association was, as has been already pointed out, not to be made as a lump valuation, but the said assets were to be separately valued, item by item. Nothing was included in the assets of the Provincial Association, transferred or acquired by the Dominion Company in respect of the said $30,000, or of any claim in respect thereof, nor was any valuation made in respect thereof, and it is proved that all the assets of the Provincial Association were transferred to the Dominion Company, as the agreement contemplated. The trial judge was of opinion that representatives of the Dominion Company "joined in the conspiracy," as he considered it, as to the said $30,000 and the payment thereof. This does not seem to have been established, or even suggested against them, with the possible exception

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of Mr. Holland, and even as to him it does not appear that there is any satisfactory evidence to this effect.

If the Provincial Association ever had a claim for, or in respect of, the said $30,000, it never made it good, or even advanced it before the present proceedings, and no such claim was ever transferred to or vested in the liquidator of the Dominion Company.

Much argument was addressed to the Board as to the $30,000 transaction being ultra vires. No such ground of action is explicitly founded on in the statement of claim. The transaction may have been unauthorized by the Provincial Association or the Dominion Company, but it cannot be said to have been ultra vires. If the facts had been disclosed to the shareholders of either company they would have been quite entitled to approve of the payment, and if they had so done, this Board is of opinion that the payment could not have been challenged. The true ground of challenge is not that the transaction was ultra vires, but that it was unauthorized. A company cannot adopt or effectively approve of what is ultra vires, but it can adopt and approve of what is merely unauthorized.

But, further, in the opinion of this Board, any claim by the Dominion Company, or the liquidator thereof, to recover the said $30,000, if competent at all, could only be based on constructive trust: *Taylor* v. *Davies* (1), and is therefore now barred by the Limitations Act of Ontario.

No doubt in the statement of claim it is said that the $30,000 was paid and received as a bribe, which might give rise to an equitable debt: *Metropolitan Bank* v. *Heiron.* (2) But the foundation of the claim here is constructive trust affecting money which never was reduced into possession as the property of the Provincial Association.

The effect of the Limitations Act on a claim arising under a constructive trust was considered in the case of *Taylor* v. *Davies* (1), and it was there laid down that there is a distinction between a trust which arises before the occurrence of the transaction impeached and cases which arise only

(1) [1920] A. C. 636. (2) 5 Ex. D. 319.

by reason of that transaction. The result is that in any event this action, so far as it proceeds at the instance of the liquidator of the Dominion Company, must fail. So far as Miss Hancock is concerned, she only claims in and through the Provincial Association; that association is not made a party to the action; and moreover Miss Hancock is proved to have been acquainted with the facts from the first, and her claim is therefore statute barred.

As regards the second action, the plaintiffs here are (1.) the liquidator of the Dominion Company; (2.) the Dominion Company on behalf of itself and all other shareholders of the Provincial Association; and (3.) John R. Young, suing on behalf of himself and all other shareholders of the Provincial Association, and all shareholders of that association prior to June 29, 1902, who transferred their shares in the said association pursuant to the agreement of June 29, 1902.

The Dominion Company is not and never was a shareholder of the Provincial Association, and that association is not made a party to this action any more than it was to the first action. As the Dominion Company is not and never was a shareholder of the Provincial Association, it cannot maintain this action as a shareholder's action, neither can the liquidator of the Dominion Company, whose claim can only be in right of the company.

With regard to Mr. Young, who claims in two representative capacities, he is not a shareholder in the Provincial Association, his shares having been surrendered. Neither can he claim in his other representative capacity, because the directors of the association whom he is suing were the agents of the association and not of the shareholders, and there was no privity between the shareholders as such and the directors. The fiduciary relation of the directors was to the association.

It is for this reason that no action of this sort can be brought by shareholders without making the company party. When this claim is supposed to have arisen, the Provincial Association was either already defunct, or still in existence. If defunct, it could make no claim and pass no claim. If in

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existence then, it is in existence now, and should have been brought before the Court.

Moreover, for the reasons given in the earlier part of this judgment, any claim by any and all of the plaintiffs would now be barred by the Limitations Act.

It was suggested before their Lordships that the claim might be treated as one for damages for concealed fraud, but to this there are two answers. The action is not so framed, and a representative action by one of several defrauded persons on behalf of himself and all others will not lie.

A point was taken on behalf of the defendants based upon the fact that judgment had been already obtained against one of them, Davies, they contending that the doctrine in the case of *Kendall* v. *Hamilton* (1) would preclude further recovery against them. This argument did not commend itself to the Court of Appeal in Canada, and their Lordships think it was rightly discarded. There are probably other answers to it, but it is enough to say that the liability of the several defendants in this case, if any, was not a mere joint liability, but was joint and several.

The other grounds of defence are, however, in their Lordships' opinion, amply sufficient, and on these grounds, which cover both actions, they will humbly recommend His Majesty that both appeals should be dismissed with costs.

Solicitors for appellants: *Lee & Pembertons.*

Solicitors for respondents: *Lawrence Jones & Co.*

(1) 4 App. Cas. 504.

[PRIVY COUNCIL.]

WALPOLE . . . . . APPELLANT;

AND

CANADIAN NORTHERN RAILWAY COMPANY . . . . . RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Canada—Fatal Accident—Action in Saskatchewan—Accident in British Columbia—Cause of Action—Fatal Accidents Act (R. S. Sask., 1909, c. 135), s. 2—Workmen's Compensation Act (Stats. of B. C., 1916, c. 77), s. 11, sub-s. 1.

The appellant's husband, a resident in British Columbia, was killed in that Province in the course of his employment by the respondents, a railway company, and owing to the negligence of their servants. The appellant subsequently went to reside in Saskatchewan, and there sued the respondents under the Fatal Accidents Act of that Province, under which an action can be maintained only if the deceased person could have maintained an action and recovered damages. Common employment is not a defence in Saskatchewan. Under the Workmen's Compensation Act of British Columbia, the deceased, had he lived, and on his death his dependents, had a right to compensation out of a fund contributed to by employers; by s. 11, sub-s. 1, of the Act that right was in lieu of any right of action against the employer, the latter right being expressly barred:—

Held, that the action could not be maintained, both (1.) because the deceased could not himself have maintained an action as required by the Fatal Accidents Act, and (2.) because the act of negligence having occurred in British Columbia, and not being actionable, or proved to be punishable, in that Province, an action in respect of it could not be maintained in Saskatchewan under the rule laid down in *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment (December 14, 1921) of the Court of Appeal of Saskatchewan affirming a judgment (November 30, 1920) of Bigelow J.

The appellant sued the respondents in the Court of King's Bench of Saskatchewan under the Fatal Accidents Act of that Province (R. S. Sask., 1909, c. 135). The action arose out of a fatal accident sustained by the appellant's husband in the

* *Present:* VISCOUNT CAVE, LORD PARMOOR, LORD PHILLIMORE, LORD JUSTICE-CLERK, and MR. JUSTICE DUFF.

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Province of British Columbia (where he was resident) and in the course of his employment by the respondents. The facts of the case and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The action was tried by Bigelow J. sitting with a jury; the jury found that the accident was caused by the negligence of the respondents. The learned judge dismissed the action upon a consideration of the law. That decision was affirmed by the Court of Appeal of Saskatchewan.

1922. July 17, 18. *Hon. Geoffrey Lawrence* and *D. Campbell* for the appellant. The action was maintainable. The act of neglect upon which it was founded was tortious in Saskatchewan, and the Workmen's Compensation Act of British Columbia did not make it "justifiable," the word used in *Phillips* v. *Eyre* (1), or an "innocent" act, the word used in *Machado* v. *Fontes* (2) in that Province. That Act did not absolve the negligence of its tortious character, but merely altered the method of redress. Further, the respondents were liable to criminal proceedings under ss, 283, 284, of the Canadian Criminal Code; that was sufficient to render the act not "justifiable" or an "innocent" act: *Machado* v. *Fontes*. (2) The deceased man therefore could have maintained an action in Saskatchewan; this action can therefore be maintained under s. 2 of the Fatal Accidents Act. For the same reasons the rule in *Phillips* v. *Eyre* (1) does not directly preclude the present action. In *Canadian Pacific Ry. Co.* v. *Parent* (3) the deceased man was barred by his own contract. The decision in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (4) does not affect the present contention. [Reference was also made to *Scott* v. *Lord Seymour* (5); *The M. Moxham* (6); and *Davidson* v. *Hill* (7); also to Dicey's Conflict of Laws, 2nd ed., pp. 645, 708, 710.]

Clauson K.C., *O. H. Clark K.C.* and *J. Forster* for the

(1) L. R. 6 Q. B. 1, 29.
(2) [1897] 2 Q. B. 231.
(3) [1917] A. C. 195.
(4) [1920] A. C. 184.
(5) (1862) 1 H. & C. 219.
(6) (1876) 1 P. D. 107.
(7) [1901] 2 K. B. 606.

respondents. The action is not one which lies at common law; it is maintainable only if the Fatal Accidents Act of Saskatchewan applies, and its conditions are satisfied. That Act applies only to deaths within the legislative jurisdiction of Saskatchewan: *Johnson* v. *Canadian Northern Ry. Co.* (1); *Canadian Pacific Ry. Co.* v. *Parent.* (2) There is no reported case of an action under Lord Campbell's Act in which the death occurred outside the British legislative jurisdiction; in *Davidson* v. *Hill* (3) it occurred on a British ship. If the Act applies at all to a death outside the Province, there was in this case no right to sue, because the deceased, had he lived, could not have maintained an action and recovered damages, the condition in s. 2. Both he and the appellant were precluded by s. 11, sub-s. 1, of the Workmen's Compensation Act of British Columbia from bringing any action against the respondents in respect of the accident. That provision operated as a statutory contract: *British Columbia Electric Ry. Co.* v. *Gentile* (4); it was as effectual to bar the present action as the personal contract in *Parent's Case* (2) was to bar that action: *Union Steamship Co. of New Zealand* v. *Robin.* (5) Under the rule in *Phillips* v. *Eyre* (6) the act sued on must be one which in the jurisdiction in which it occurred gave rise to a liability between the parties to the action in question; if (as here) the law "extinguishes the right," no cause of action arises in another jurisdiction. The right to compensation not at the hands of the defendant is not sufficient. It was not established in this case that the act amounted to an indictable offence. [Reference was also made to Westlake's Private International Law, 4th ed., p. 261, §§ 199, 200.]

Hon. Geoffrey Lawrence in reply referred to *Lewis* v. *Grand Trunk Ry. Co.* (7)

Oct. 24. The judgment of their Lordships was delivered by VISCOUNT CAVE. This is an appeal from a judgment of

(1) (1909) 19 Man. L. R. 179.
(2) [1917] A. C. 195, 206.
(3) [1901] 2 K. B. 606.
(4) [1914] A. C. 1034.
(5) [1920] A. C. 654, 662.
(6) L. R. 6 Q. B. 1, 29.
(7) (1915) 52 Can. S. C. R. 227.

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the Court of Appeal for the Province of Saskatchewan affirming the judgment of the Court of King's Bench for the same Province, whereby judgment was entered for the respondents in an action brought by the appellant for damages under the Fatal Accidents Act of the Province.

The respondents are a railway company incorporated by a Dominion Act (1 Edw. 7, c. 51), and operating a system of railways in British Columbia, Saskatchewan, and other parts of Canada. Thomas William Walpole (the appellant's husband) was a locomotive engineer in the employment of the respondent company, and at the time of the accident which gave rise to this action, was resident at Lucerne in British Columbia. On April 17, 1919, he was in charge of a locomotive which was proceeding with a freight train on the respondents' railway, westward of the village of Lucerne; and when the train reached a high bridge supported by piles, the bridge gave way and the locomotive fell into the stream beneath, and Walpole sustained injuries which proved fatal. The appellant took out letters of administration of her husband's estate in British Columbia; but shortly afterwards she went to reside at Saskatoon in Saskatchewan, and her letters of administration were resealed in that Province. On November 4, 1919, she commenced in the Court of King's Bench of Saskatchewan an action against the respondents under the Fatal Accidents Act, claiming, on behalf of herself and her infant daughter, damages for the respondents' negligence and the resultant death of her husband.

The action was tried at Regina by Bigelow J. and a jury. At the close of the case the respondents moved for a non-suit on the ground that, having regard to the provisions of the Workmen's Compensation Act of British Columbia, the action did not lie. The learned judge reserved his decision on this question, and put certain questions to the jury, who answered them as follows: "1. Was the accident caused by the negligence of the defendant? *Answer.*—Yes. 2. If so, in what did such negligence consist? *Answer.*—The negligence of the defendant consisted in not keeping the bridge in safe repair. 3. Damages. (*a*) for widow Edith

May Walpole. *Answer.* — $10,000.00. (*b*) For infant Madeline Isabel. *Answer.*—$6,000.00." The learned judge, however, entered judgment for the respondents on the point of law, and upon appeal to the Court of Appeal for Saskatchewan that Court affirmed the decision. Thereupon the present appeal was brought to His Majesty in Council.

The Fatal Accidents Act of Saskatchewan (R. S. Sask., 1909, c. 135), which is similar for all purposes material to this action to the British statute known as Lord Campbell's Act, provides as follows : " Whenever the death of a person has been caused by such wrongful act, neglect or default as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in each case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the party injured." It is provided by the Act that every such action is to be for the benefit of the wife or other dependents of the person whose death has been so caused, and is to be brought by the executor or administrator of such person. A similar statute is in force in British Columbia (R. S. B. C., 1902, c. 11).

Part I. of the Workmen's Compensation Act of British Columbia (Stats. of B. C., 1916, c. 77), which applies to railways, provides (by s. 6) that : " Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by this Part shall be paid by the Board out of the accident fund." Accident is defined (in s. 2) as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Sect. 11, sub-s. 1, of the Act is as follows : " The provisions of this Part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law, or by any statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the

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employer shall lie in respect of such accident." The scale of compensation payable to a workman, or (when death results from the injury) to his dependents, is fixed by ss. 15 to 24. Later sections provide for the formation of the accident fund, which is raised by yearly assessments on the employers on the basis of their pay-rolls; and for the constitution of a Workmen's Compensation Board, which is to make and collect the assessments, and is to determine, without appeal, all questions relating to compensation.

The question raised in this appeal is whether, having regard to these provisions, the appellant, as administratrix of the deceased, can recover in the Courts of Saskatchewan damages for the respondents' negligence in British Columbia, which resulted in his death. In their Lordships' opinion she cannot. By the common law the legal personal representative of a person whose death is caused by the negligence of another has no right to sue for damages; and the Fatal Accidents Act of Saskatchewan confers that right on the representative only in cases where the deceased himself, if he had lived, would have been entitled to maintain an action and recover damages. Now, in the present case such an action if brought by Walpole himself, would have been barred by the provisions of the Workmen's Compensation Act of British Columbia, and particularly by s. 11, sub-s. 1, of that Act. The effect of that statute was that the deceased, who was resident and employed in British Columbia, held his contract of employment subject to the double condition—first, that he should be entitled to compensation for accidents, however caused, and, secondly, that he should have no other remedy. These conditions were, by virtue of the statute, incorporated in his contract, and were binding upon him wherever his action might be brought; and if he had lived and had himself commenced proceedings in Saskatchewan for the company's negligence, the condition would have been a sufficient answer to his claim.

From this it follows that the condition upon which alone the appellant was entitled to sue—namely, that the deceased himself might have sued had he lived—is not fulfilled, and

the action fails on that ground. The decisions of the Board in *Canadian Pacific Ry. Co.* v. *Parent* (1) and *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (2) are in point.

The difficulty may be put in another way. By the well-known rule laid down by Willes J. in *Phillips* v. *Eyre* (3) an action will not lie in one country or province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the forum; and, secondly, it must not have been justifiable by the law of the country where it was done. It is unnecessary for the purposes of this appeal to consider the precise meaning of the term "justifiable," as used by Willes J.; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. In the present case the negligence of the company was not actionable in British Columbia; for, under the Workmen's Compensation Act of the Province, no action would lie against the company, but only a claim against the Board for compensation. It was, indeed, suggested that the negligence of the company might have been the subject of a prosecution in British Columbia under s. 283 or s. 284 of the Criminal Code; but criminal negligence was neither alleged nor proved in the Canadian Courts, and the Board cannot assume its existence. This being so, then on this ground also an action by the deceased would have failed, and the appellant's action fails also.

It was further suggested on behalf of the respondent company that the Fatal Accidents Act of Saskatchewan is confined to cases of negligence occurring within that Province; but this question was not fully discussed, and their Lordships therefore express no opinion upon it.

For the reasons above given, their Lordships agree with

(1) [1917] A. C. 195. (2) [1920] A. C. 184.
(3) L. R. 6 Q. B. 1.

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the conclusion of the Court of Appeal, and they will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.* 1922 Oct. 24.

McMILLAN . . . . . APPELLANT;

AND

CANADIAN NORTHERN RAILWAY COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Canada—Negligence—Action in Saskatchewan—Negligence in Ontario—Common Employment—Cause of Action—Workmen's Compensation Act (4 *Geo.* 5, *c.* 25, *Ont.*), *ss.* 13, 15.

The appellant, a resident in Ontario, in the course of his employment by the respondents, a railway company, was injured in that Province owing to the negligence of a fellow servant. He sued the respondents for damages in Saskatchewan, in which Province common employment was not a defence. Under the Workmen's Compensation Act of Ontario (4 Geo. 5, c. 25, Ont.) the appellant had the right, whether the accident was due to negligence or not, to be paid by the respondents compensation to be determined by a Board, according to a fixed scale. Apart from that Act common employment was a defence to an action in Ontario:—

Held, that the action could not be maintained, since the negligent act upon which it was founded was "justifiable" in Ontario within the meaning of the rule in *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment (November 28, 1921) of the Court of Appeal of Saskatchewan affirming a judgment of Bigelow J.

The appellant brought an action against the respondents in the Court of King's Bench of Saskatchewan to recover

* *Present:* VISCOUNT CAVE, LORD PARMOOR, LORD PHILLIMORE, LORD JUSTICE-CLERK, and MR. JUSTICE DUFF.

damages for personal injuries resulting from an accident in Ontario on the railway of the respondents, his employers. The facts, and the material provisions of the Workmen's Compensation Act of Ontario (4 Geo. 5, c. 25), appear from the judgment.

The Court of Appeal, affirming the trial judge, dismissed the action.

1922. July 18. *Hon. Geoffrey Lawrence* and *D. Campbell* for the appellant.

Clauson K.C., *O. H. Clark K.C.*, and *J. Forster* for the respondents.

The argument followed immediately on that in *Walpole* v. *Canadian Northern Ry. Co.* (1), and dealt with the provisions of the Workmen's Compensation Act (4 Geo. 5, c. 25, Ont.) in their relation to the argument in that appeal.

Oct. 24. The judgment of their Lordships was delivered by

Viscount Cave. This is an appeal from a judgment of the Court of Appeal of Saskatchewan, affirming the judgment of the Court of King's Bench for the same Province, whereby judgment was entered for the respondent company in an action brought by the appellant for damages for injuries. The action is similar in some respects to that of *Walpole* v. *Canadian Northern Ry. Co.* (1), in which judgment has lately been delivered by the Board; but there are material differences both of fact and law to which reference must be made.

The appellant, at the time of the accident giving rise to the action, and for some time prior thereto, was a resident in Ontario, and was employed by the respondent company as a locomotive fireman. On November 12, 1918, the appellant in the course of his employment, was working a switch engine on the respondents' railway at Rainy River in the Province of Ontario; and while he was so employed, some railway coaches, which were standing on an inclined side track and which had not been properly braked, ran down the

(1) See ante, p. 113.

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track and struck the appellant's locomotive, causing him serious injuries. It is common ground that the failure to set the brakes on the coaches was due to the negligence of a switchman in the respondents' service. The appellant took no proceedings in Ontario, but on February 18, 1919, commenced this action against the respondents in the Court of King's Bench for Saskatchewan, claiming damages for the injuries caused to him by the negligence of the respondent company or their servants.

The action was tried by Bigelow J. and a jury, and the jury fixed the damages sustained by the appellant at $10,700; but the learned judge nevertheless entered judgment for the respondents, holding that the accident was not maintainable "because the plaintiff (appellant) was domiciled in Ontario at the time of the accident, and the Ontario statute gave the Board under the Workmen's Compensation Act, exclusive jurisdiction over the matter in question." On appeal to the Court of Appeal for Saskatchewan, that Court (consisting of Haultain C.J. and Lamont and Turgeon JJ.) affirmed the judgment, but on somewhat different grounds. Hence the present appeal.

Before examining the reasons given by the Court of Appeal for its decision, it is necessary to state briefly the statute law applicable to the case. By Part I. of the Workmen's Compensation Act of Ontario (4 Geo. 5, c. 25), which applies to railways, it is provided (by s. 3) that: "Where in any employment to which this Part applies personal injury by accident arising out of and in the course of the employment is, after a day to be named by proclamation of the Lieutenant-Governor-in-Council, caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned."

"Accident" is defined (by s. 2) as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Other material sections are as follows: "4. Employers in the industries for the time being included in schedule 2" (which includes railways) "shall be liable individually to pay

the compensation. 5. Employers in the industries for the time being included in schedule 1 shall be liable to contribute to the accident fund as hereinafter provided, but shall not be liable individually to pay the compensation. 13. No action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board. 15. The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the first day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie."

The Act fixes the scale of compensation, and sets up a Workmen's Compensation Board, which is to make and collect the assessments on employers in sch. 1, and is to have exclusive jurisdiction to determine all questions arising under Part I. of the Act. By Part II. of the Act the doctrine of common employment is excluded as to all employers falling within that part; but this provision has no application to railway companies.

It will be seen from the above summary that the Workmen's Compensation Act of Ontario differs from that of British Columbia (which was in question in *Walpole's Case* (1)) in one material respect—namely, that in the former Province claims for compensation for accident are in the case of certain industries, including railways, to be made not against the Board, but against the employers individually; but the amount of compensation so recoverable is limited by the statute and is recoverable only by proceedings before the Board. It should be added that in Saskatchewan the doctrine of common employment is altogether excluded (R.S. Sask., 1920, c. 39, s. 26).

The action brought by the appellant in the present case is a common law action for tort; and it is well-established that in order to found such an action in this country for a wrong

(1) Ante, p. 113.

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alleged to have been committed abroad, two conditions must be fulfilled which were defined by Willes J. in *Phillips* v. *Eyre* (1) as follows: "First, the wrong must be of such a character that it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

The same rule, of course, applies to an action brought in one province of Canada for a wrong alleged to have been committed in another; and it is, therefore, necessary, in order that the present action may be sustained, to establish, not only that the negligent act upon which the action is founded would have been actionable under the law of Saskatchewan if it had been committed within that Province, but also that it was not justifiable by the law of Ontario. Whether the first condition is complied with in this case need not be considered if (as the Court of Appeal have held) the second is not fulfilled.

The learned judges of the Court of Appeal pointed out that up to the time of the passing of the Workmen's Compensation Act of Ontario the negligence in question, having been committed by a fellow servant of the appellant, would not have been imputed to the respondents or susceptible of any proceedings against them; and they held that the fact that by the Act the respondents were made liable to pay compensation for the accident in question did not make it otherwise than justifiable so far as they were concerned. The latter point was dealt with by the Chief Justice as follows: "The liability thus created is not to pay damages for a wrongful act, but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The act complained of in this case was the act of a fellow servant, which, by the law of Ontario, is neither wrongful nor unjustifiable so far as the employer is concerned, and in regard to which the employer may justly be said to be innocent or excusable. The accident which happened in this case was an unforeseen event, which neither of the parties has occasioned or could prevent. The

(1) L. R. 6 Q. B. 1, 28.

mere fact that the employer is liable to pay compensation for such an *accident* does not, in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the *act* upon which an action in this Province, founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident."

In their Lordships' opinion the reasoning of the Chief Justice, which was in substance adopted by the other members of the Court, is both sound in itself and sufficient to conclude this case. No action for the negligence in question could have been brought against the company in Ontario apart from the statute; and the claim given by the statute is not a claim for damages for tort, but a claim (strictly limited in amount) for compensation for the accident. The statute, therefore, does not make the negligence of the fellow servant not justifiable by the employer. There is no question in this case of criminal liability.

For the above reasons their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.* 1922 Oct. 26.

McCOLL . . . . . APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } RESPONDENTS.

ATTORNEY-GENERAL FOR MANITOBA INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Canada—Fatal Accident—Dominion Railway—Breach of Order of Railway Board—Accident and Action in Manitoba—Cause of Action—Dominion and Provincial Acts—Incidental Conflict—Railway Act (9 & 10 *Geo.* 5, *c.* 68, *Dom.*), *s.* 385—*Workmen's Compensation Act* (6 *Geo.* 5, *c.* 125, *Man.*), *s.* 13.

The appellant's husband, in the course of his employment by the respondents, a Dominion railway company, was killed in Manitoba, where he resided, owing to the failure of the respondents' servants to comply with an order of the Railway Board of Canada. She sued the respondents in Manitoba claiming damages under the Fatal Accidents Act (R.S. Man., 1913, c. 36) and under s. 385 of the Railway Act of Canada (9 & 10 Geo. 5, c. 68).

By s. 385 of the Railway Act any company which does any act contrary to the orders of the Railway Board is "liable to any person injured . . . . for the full amount of the damages sustained thereby." Under the Workmen's Compensation Act of Manitoba (6 Geo. 5, c. 125) the deceased man, and his dependents, had a right to compensation, but s. 13 provided that that right was in lieu of any right of action, statutory or otherwise, to which he or they might be entitled against the respondents by reason of the accident, and that no action in respect thereof should lie. An accident under the Fatal Accidents Act of Manitoba (R.S. Man., 1913, c. 36) lies only if the person killed, had he lived, could have maintained an action.

Held (1.) that the appellant was not a "person injured" within the meaning of s. 385 of the Railway Act, since the operation of the section was subject to the common law rule that an action does not lie for damages suffered in consequence of the death of a human being; and (2.) that there could not be implied in s. 13 of the Workmen's Compensation Act an exception preventing an action under s. 385 by the deceased, had he survived, from being barred. The Dominion and the Provincial Acts dealt with different subjects, and the fact that a conflict might arise was not a ground for implying words of exception in the Provincial Act.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment (December 20, 1921) of the Court of Appeal for Manitoba, affirming a judgment of Prendergast J.

* *Present:* VISCOUNT CAVE, LORD PARMOOR, and MR. JUSTICE DUFF.

The appellant sued the respondents, a Dominion railway, in the Court of King's Bench of Manitoba, claiming damages, on behalf of herself and her infant daughter, in consequence of the death of her husband. Her husband, in the course of his employment by the respondents, had been killed in Manitoba owing to the respondents' servants failing to comply with an order of the Board of Railway Commissioners of Canada. The action was brought under the Fatal Accidents Act of Manitoba (R.S. Man., 1913, c. 36) and under the Railway Act of Canada (9 & 10 Geo. 5, c. 68). The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Court of Appeal affirmed the trial judge, who had dismissed the action. The appellant obtained leave to appeal in forma pauperis.

1922. July 7, 14. *Hon. Geoffrey Lawrence* and *D. Campbell* for the appellant. The appellant can maintain this action under s. 385 of the Railway Act (9 & 10 Geo. 5, c. 68, Dom.); she was a " person injured " by the breach of the orders of the Railway Board within that section. The loss to the appellant owing to the death of her husband constituted a legal injury: *Pym* v. *Great Northern Ry. Co.* (1); *Blake* v. *Midland Ry. Co.* (2). The words cannot mean only a person physically injured, because the section clearly applies to injury to a person's goods. The right of action was not taken away by s. 13 of the Workmen's Compensation Act of Manitoba. Having regard to the definition of " accident " in s. 2, and to s. 3, of that Act, an action under s. 385 of the Railway Act is not an action " for, or by reason of the accident " so as to be barred by s. 13. If, on the true construction of s. 13, it purports to bar an action under s. 385, it is to that extent ultra vires. Sect. 385 of the Railway Act deals with breaches by Dominion railways of the provisions of the Act, and therefore with a matter within the legislative power of the Dominion and expressly excluded from that of the Province: *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada*. (3) It was

(1) (1863) 4 B. & S. 396. (2) (1852) 18 Q. B. 93.
(3) [1907] A. C. 65.

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not competent to the Province to bar the right given. If, therefore, s. 13 by its terms does so, it must in effect be subject to an implied exception of actions of that character. In any case the appellant's husband was a "person injured." Had he survived he would have had a right of action under s. 385, and for the reasons adduced that right would not have been barred by s. 13 of the Provincial Act; consequently, the appellant could maintain the action under the Fatal Accidents Act.

Tilley K.C., for the respondents, contended as appears from the judgment.

Sir John Simon K.C. and *MacWilliams K.C.*, for the interveners.

Oct. 26. The judgment of their Lordships was delivered by

Mr. Justice Duff. This appeal presents a question as to the construction of s. 385 of the Railway Act of Canada, and one as to the construction and effect of the Workmen's Compensation Act of Manitoba, s. 13 of c. 125 of the statutes of Manitoba, 6 Geo. 5.

The appellant's husband, a workman employed on the respondents' railway, was killed when travelling on one of the respondents' trains in the course of his employment, when the car on which he was riding came into collision with an obstruction and was wrecked. The accident was due to the neglect of the Company's servants in not observing an order of the Board of Railway Commissioners for Canada, which required the defendant Company in loading its railways cars to be governed by "the clearance limits" of the road over which they passed.

The section of the Railway Act with which we are concerned, is s. 385 and is in these words:—"Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor-in-Council, or of the Minister, or of the

Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act."

The appellant's husband having received the injury which caused his death from a contravention of an order of the Board of Railway Commissioners, on behalf of the appellant it is contended that she herself (as well as her infant daughter, for whose benefit she sues), is in respect of the loss accruing to her in consequence of his death, a " person injured," within the meaning of the section, and that the effect of the section is to create, without regard to Provincial law, a liability to each of them in respect of such loss. On behalf of the respondents, Mr. Tilley argues that the section creates no liability independently of the law of the Province where the injury occurs, and that its office is limited to affirming the responsibility of the company, and of the persons to whom it applies according to the principles of Provincial law for acts or omissions falling within it. Their Lordships consider it unnecessary to express any opinion upon this view advanced by the respondents as to the construction and effect of the section.

The contention of the appellant in effect is that s. 385 establishes in respect of acts and omissions to which it applies a new principle of responsibility. New in the sense that independently of Provincial legislation it creates a liability to pay damages in a civil action for causing the death of a human being and new in the sense that the liability so created extends to consequences which are neither the immediate nor the direct result of the act or omission complained of nor within the intention actual or presumed of the defendant.

It must indeed be apparent that if under this section the dependents of a person suffering death in consequence of a

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dereliction falling within it are entitled to be indemnified in respect of " the full amount of damages sustained " by reason of such death, then the statutory right of indemnity must, by strict analogy, be shared by other classes of persons having legal or business relationships with the deceased and suffering loss in consequence of being deprived of advantages which they might reasonably have expected to enjoy if he had continued to live. Nor, if this be the effect of the section in cases in which death has ensued, can responsibility be limited to such cases. It must exist in numerous other cases where loss is indirectly inflicted upon persons other than those who suffer directly in their persons or property by reason of a default within the section ; as for instance where a breach of statutory duty causes an injury disabling the immediate sufferer from performing his contractual obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

It is of course conceivable that interests thus indirectly affected might be considered by a legislator to be fit subjects for protection by remedial process ; but the difficulty of prescribing limits for the operation of such a method of assigning responsibility is obvious, and the common law, speaking generally, regards the protection of such interests as impracticable. As Blackburn J. (as he then was) said in delivering the judgment of the Court of Queen's Bench in *Cattle* v. *Stockton Waterworks Co.* (1) : " It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge J., in *Lumley* v. *Gye* (2), Courts of justice should not ' allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree."

" Instances might be indefinitely multiplied " Lord

(1) (1875) L. R. 10 Q. B. 453, 457.

(2) (1853) 2 E. & B. 216, 252.

Penzance observed in *Simpson* v. *Thomson* (1) of claims indistinguishable in principle from that now advanced "giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

Their Lordships think that an intention to establish a novel principle of responsibility of such indefinite scope in relation to a special class of acts and omissions ought not to be inferred from general words which are not apt for the purpose, and to which full effect can be given by a construction in harmony with the policy of the law in granting redress in other cases of injuria cum damno.

The Courts below have taken the view that the operation of the section is subject to the rule of the common law that an action does not lie for damages suffered in consequence of the death of a human being. Their Lordships see no reason to differ from this conclusion ; and their Lordships agree with the observation of Prendergast J. that in this connection the absence of anything specifying the class or classes of persons entitled to indemnity in such circumstances is significant.

Since Lord Campbell's Act was enacted in 1846 similar legislation has been passed by many Legislatures in the United States as well as in British dominions. Many of these statutes are collected in an appendix to Shearman and Redfield's Law of Negligence, and it appears to be the general practice in enacting such statutes to define the class or classes of persons for whose benefit an action may be brought ; and the fact that the Railway Act is silent upon this matter affords, their Lordships agree, an indication that the section is not addressed to the subject of indemnity for damages arising from death.

The opinion already indicated touching the effect of the general words employed in s. 385 is not without support from the analogy of decided cases dealing with similar language in other statutes. In *The Vera Cruz* (2), for example, the plaintiff contended that an action in rem for damages under Lord Campbell's Act was within the jurisdiction created

(1) (1877) 3 App. Cas. 279, 290.

(2) (1884) 9 P. D. 96.

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by the Admiralty Court Act of 1861 (24 Vict. c. 10), s. 7, which gave power to that Court to entertain an action in rem when brought to enforce " any claim for damage done by any ship." In the judgments of the Lords Justices there are observations apposite to the question now presented for decision. Bowen L.J. said : " The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injuriously affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship." (1) Fry L.J. added : " Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it ? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act) though it is for damages resulting from or arising out of damage done." (1)

Again, in the *British Columbia Electric Ry. Co.* v. *Gentile* (2) the question before this Board was whether a clause in the appellant company's special Act affecting actions against the company " for indemnity for any damage or injury sustained by reason of the railway or the operations of the company " with a certain time limit applied to an action under the British Columbia Statute re-enacting Lord Campbell's Act taken by the dependents of a person killed in circumstances

(1) (1884) 9 P. D. 101.

(2) [1914] A. C. 1034.

which, if he had survived, would have brought his right of action within the clause. Lord Dunedin in delivering the judgment of the Board said that " indemnity " in the clause mentioned " obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company," (1) and the Board held that " a suit brought under the provisions of that Act " (Lord Campbell's Act) " is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants " which " operations " ex hypothesi had been the cause of the death that was the foundation of the claim ; in other words, an action under Lord Campbell's Act is not an action for " damage sustained by the plaintiff by reason of " the wrongful act which caused the death in respect of which the claim is made.

Their Lordships therefore think that the appellant's claim cannot be sustained by force of s. 385 alone.

The next question for consideration is that raised by the appellant's contention that a right to compensation is vested in her by the combined operation of the provision of the Railway Act already discussed and R. S. Man., 1913, c. 36, ss. 2 and 3, which, in substance, reproduce the principal enactments of Lord Campbell's Act, 9 & 10 Vict. c. 93.

On behalf of the respondents, it is not disputed that the appellant would have a valid claim under this statute, were it not for certain provisions of the Workmen's Compensation Act, a statute of Manitoba (6 Geo. 5, c. 125), which, it is contended, deprive her of any such right. The Workmen's Compensation Act makes provision for a fund from which compensation is to be paid to workmen injured by accidents arising out of and in the course of, their employment, and to their dependents where such injury results in death, and creates a Board, known as the Workmen's Compensation Board, for its administration. By s. 13 it is enacted that the right to compensation given by the Act shall be " in lieu of all rights and rights of action, statutory or otherwise, to

(1) [1914] A. C. 1039.

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which a workman or his dependents are, or may be, entitled against the employer of such workman for, or by reason of, any accident " in respect of which a right of compensation is given, and it is further provided that " no action in any Court of law in respect thereof shall . . . . lie." By s. 61, sub-s. 4, and by s. 13, sub-s. 2, it is in substance provided that the Board shall upon the application of any party to an action brought by a workman or his dependent against an employer, have jurisdiction to determine whether the party bringing the action is entitled to maintain it, or only to compensation under the Act, and that such decision shall be final and conclusive between the parties. The Board on November 24, 1920, after the commencement of the action from which the appeal arises, declared that the accident in respect of which the action was brought was one in respect of which the dependents of the deceased William McColl had a right to compensation under the Act, and that the right of action asserted was not maintainable.

It is quite clear that if s. 13 of the Workmen's Compensation Act applies to the claim advanced by the appellant, then that section affords an answer to the claim. On the part of the appellant it is contended that s. 13 does not apply, because on any admissible construction of s. 385 of the Railway Act, a right of action is thereby given to the employees of the Railway Company injured in consequence of any act or omission within the section, even though the circumstances of the injury should be such as would give the workman a right to compensation according to the terms of the Workmen's Compensation Act. It follows, it is argued, that s. 13 cannot apply to accidents giving rise to rights of action under s. 385, because it must be presumed that the Manitoba Legislature did not intend to enact legislation in conflict with the statutes of the Dominion Parliament within its undoubted jurisdiction.

Their Lordships cannot agree that such an implied exception could properly be introduced into s. 13 of the Workmen's Compensation Act. Sect. 385 of the Railway Act (a statute passed by the Dominion Parliament) deals with the consequences, by way of civil liability, of the contravention of

statutory enactments and regulations on the subject of railways. It was passed by Parliament in exercise of its jurisdiction over that subject. The Workmen's Compensation Act is an Act passed by the Province of Manitoba in exercise of its jurisdiction over civil rights imposing upon employers certain responsibilities and giving employees certain rights in respect of injuries arising out of industrial accidents. The enactments deal with different subject-matter, although the circumstances of a particular case may bring it within the scope of both enactments, in which case, if a conflict arises, it is the Dominion legislation which prevails. But such conflicts arise only incidentally, and the fact that they do arise is not a legitimate ground for implying words of exception in one of the sections of the Provincial statute, excluding from its application cases in which the Dominion Act does not apply.

The appellant and her infant daughter, having a right to compensation under the Workmen's Compensation Act, it follows that all rights which otherwise would have accrued to them under R. S. Man., 1913, c. 36, are displaced by s. 13 of the later statute.

For these reasons, the appeal, in their Lordships' opinion, fails, and they humbly advise His Majesty that it should be dismissed.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents and intervener: *Blake & Redden.*

Distinguished. BENNETT & WHITE (CALGARY) LD. *v.* SUGAR CITY [1951] A. C. 786

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CITY OF MONTREAL . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

ATTORNEY-GENERAL FOR QUEBEC . INTERVENER.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC, APPEAL SIDE.

Canada—Taxation—Demised Crown Lands—Taxation of Lessee's Interest—City of Montreal Charter (62 *Vict. c.* 58, *Queb.*), *art.* 362*a*—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 125.

Art. 362a, added to the City of Montreal Charter by 7 Edw. 7, c. 63, art. 19, provides that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay the annual and special assessments, the taxes and other municipal dues. Under the above provision annual assessments were made in respect of certain demised Crown lands; upon the tenant not paying taxes based upon the assessments the City sued him:—

Held, that as the tenant was liable only so long as his occupancy continued, the taxation was in respect of his interest as lessee, and accordingly was not a tax on Crown lands so as to be ultra vires under s. 125 of the British North America Act, 1867; and that the taxes were recoverable from the tenant by action or by distress of goods, but that the provisions of the Charter for the recovery of taxes by sale of the land were not applicable.

Smith v. *Vermillion Hills Rural Council* [1916] 2 A. C. 569 applied.

Judgment of the Appeal Side reversed.

APPEAL by special leave from a judgment (June 26, 1919) of the Court of King's Bench for Quebec (Appeal Side) reversing a judgment of the Recorder's Court of Montreal.

The appeal arose out of an action brought by the appellant city against one Baile in the Recorder's Court for the City of Montreal to recover certain municipal taxes for the years 1912 and 1913. The Attorney-General intervened and alleged that art. 362a of the Charter of the City (62 Vict. c. 58, Queb.), under which the taxes were imposed upon Baile as

* *Present:* VISCOUNT CAVE, LORD PARMOOR, LORD PHILLIMORE, LORD JUSTICE-CLERK, and MR. JUSTICE DUFF.

a tenant of demised Crown land, was ultra vires. The facts of the case and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Recorder's Court held that the defendant Baile was personally liable to pay the taxes. On appeal the decision was reversed, the Court declaring that art. 362a was "without effect to empower" the City "to impose or charge the said taxes upon the said lands or upon any person as if he were owner thereof." The appeal is reported at Q. R. 29 K. B. 350.

Special leave to appeal was granted.

1922. July 18, 20. *Atwater K.C.* and *St. Pierre K.C.* for the appellants; *Hon. Geoffrey Lawrence* for the Attorney-General for Quebec, intervener. A consideration of the taxing provisions of the City Charter shows that art. 362a taxes the tenant and his interest in the land, not the land itself. Under the law of Quebec, as contained in the Civil Code, a tenant has a real right in the demised land. If the true construction of art. 362a is in doubt, it should be given an effect which is intra, rather than ultra, vires; further, under art. 9 of the Civil Code no act of the Legislature affects the rights or prerogatives of the Crown unless expressly mentioned. The present case cannot properly be distinguished from *Smith* v. *Vermillion Hills Rural Council* (1); and the appellants' contention is supported by *Calgary and Edmonton Land Co.* v. *Attorney-General for Alberta* (2) and *Fraser* v. *City of Montreal* (3), the last-named case being directly in point.

Newcombe K.C. and *T. Mathew* for the respondent. Art. 362a in effect imposes a tax upon Crown lands and is ultra vires under s. 125 of the British North America Act, 1867. The terms of the statute show that the intention was to tax the immovable property; art. 362a provides that the tenant is to be taxed as if he were the owner, and Baile was so assessed in respect of this Crown land. The statute

(1) [1916] 2 A. C. 569. (2) (1911) 45 Can. S. C. R. 170.
(3) (1914) Q. R. 23 K. B. 242.

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provided no machinery for taxing a tenant's interest, and there was nothing to prevent Crown lands from being sold to satisfy the charge: see Sect. XVIII. of the Act. The article would apply where the tenant's interest was of the smallest character, indeed smaller than the amount of the tax. *Smith's Case* (1) is distinguishable having regard to the provisions of the enactments respectively in question; in the statute there considered there was a definition of land by which a tenant's interest was expressly included. Further, the article is ultra vires, because the taxation is not direct taxation according to the view in *Cotton* v. *The King* (2); a tenant taxed as owner will obtain an indemnity from the Crown in the form of the rent paid or otherwise. [Reference was also made to *City of Victoria* v. *Bowes* (3) and *In re Town of Cochrane and Cowan.* (4)]

Atwater K.C. replied.

Oct. 24. The judgment of their Lordships was delivered by

LORD PARMOOR. The statutory Charter of the City of Montreal, as amended from time to time down to, and including, the session of the Provincial Legislature of 1912, contains a series of provisions relating to "assessments and taxation," "valuation and assessment rolls," and "the sale of immovables for taxes and assessments." The sole question involved in the present appeal is whether art. 362a of the Charter, one of the articles included under the heading "assessments and taxation," is ultra vires the Legislature of the Province of Quebec.

The article is as follows: "362a. The exemptions enacted by article 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty or to the Federal and Provincial Government, or to the board of Harbour Commissioners, who shall be taxed as if they were the actual owners of such immovables and shall be held to pay the annual and special assessments, the taxes and other municipal dues."

(1) [1916] 2 A. C. 569.
(2) [1914] A. C. 176.
(3) (1901) 8 B. C. Rep. 363.
(4) (1921) 50 Ont. L. R. 169.

In the French version "the actual owners" are designated as "les veritables propriétaires," but it is not suggested that there is any distinction between the English and French versions. The language of art. 362a of the Charter is not clear. It has been construed in the Courts below to include properties, other than those exempted in art. 362. This construction was not questioned in the argument before their Lordships, and it is on this construction that the question of ultra vires directly arises.

The relevant facts may be shortly stated. By indenture of January 9, 1913, the Minister of Railways and Canals for Canada, as representative of the Crown, demised to Andrew Baile, a coal merchant, certain Crown lands in the City of Montreal for the term of five years, from October 1, 1912, at a rent of $2184 per annum. The lands so demised were assessed in the roll of immovable property and school taxes, for the years commencing May 1, 1912, and May 1, 1913, at a capitalised value of $27,000, and in respect thereof a demand was made upon Andrew Baile, as an occupant of Government ground, for an annual tax of $405 for each year, which amounted with interest to the sum of $850.61. The sum of $405 included $270, being 1 per cent. on the capitalised value of $27,000, and a further sum of $135 as school taxes. The appellants brought an action to recover $850.61. Andrew Baile did not defend the action, but the Attorney-General of Canada intervened, claiming that art. 362a, above set out, was ultra vires of the Quebec Legislature, and unconstitutional, in so far as it applied to occupants of lands belonging to the Crown in the right of the Dominion of Canada, and that the land, contained in the demise to Andrew Baile, was exempt by virtue of s. 125 of the British North America Act. The case came, in the first instance, before the Recorder of Quebec, who decided against the contention of the Attorney-General for Canada, but this decision was reversed in a judgment of the Appeal Side of the Court of King's Bench for the Province of Quebec. Special leave to appeal against this judgment to His Majesty in Council was granted on July 22, 1920.

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The exhibits set out in the record contain the tax account for the years 1912–1913 directed to Andrew Baile, who is described as "occupant of Government ground," and as debtor to the City of Montreal "for annual assessments," amounting with interest in 1912 and 1913 to the sum of $850.61, and extracts from the valuation and assessment roll of immovable property and school taxes for the years commencing May 1, 1912, and May 1, 1913. These extracts show that the sum of $405 is made up of 1 per cent. on the capitalised value of the property, $270, and of $135 for school taxes. It is unnecessary to refer separately to the school taxes. They do not raise any special issue. Art. 393 of the Charter enacts that the roll for school taxes may be included in the register containing the assessment roll for immovables, and with the same formalities.

Art. 362a of the Charter of the City of Montreal is one of a series of sections providing for assessments and taxation in the City of Montreal. Art. 361 enacts that all immovable property situated within the limits of the city shall be liable to taxation and assessment, except such as may, by the subsequent provisions of the Charter, be declared exempt therefrom. The appellants do not under this section claim to tax Crown property within the City occupied by the Crown or by persons occupying as holders of an official position under the Crown, or to question the immunity from provincial taxation of such property under s. 125 of the British North America Act 1867. It is alleged, however, by the respondent, the Attorney-General for Canada, that although the appellant is making no claim to tax property of the Crown, occupied by the Crown, or by persons occupying as holders of an official position under the Crown, yet in effect the city is seeking indirectly to tax such property and that such taxation is ultra vires of the Provincial Legislature. Their Lordships agree in the proposition that it would be ultra vires to attempt to impose indirectly taxation which cannot be imposed directly.

On the other hand the respondent does not allege that persons occupying Crown property for commercial or industrial

purposes are not liable to Provincial taxation in respect of their tenancy or occupation, provided that the taxation is imposed in such a form that it is in reality a taxation on the interest of the tenant or occupant, and not on the property of the Crown. It would not be possible after the decision of their Lordships in *Smith* v. *Vermillion Hills Rural Council* (1) to contend that tenants who occupy Crown property, not as officials of the Crown, but for commercial or business purposes, are not liable to Provincial taxation so long as the assessment is based on their interest as occupants.

In *Smith* v. *Vermillion Hills Rural Council* (1) it was held that the statutes imposing the taxation were not ultra vires of the Legislature of Saskatchewan. The following passage from the judgment designates clearly the contentions raised in that appeal: "The appellant was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. It is contended for the appellant that the tax is sought to be imposed on the land itself, which belongs to the Crown in right of Canada, and not on any individual who is interested in it. For the respondents, on the other hand, it is argued that all that is taxed is the interest of the appellant as a tenant of the land and not the land itself as owned by the Crown." (2) Their Lordships decided in favour of the latter of these contentions on the construction of the Saskatchewan statutes.

Clause 6 of art. 361 of the Charter empowers the Council of the city to make by-laws to impose and levy on taxable immovable property in the city an assessment not to exceed 1 per cent. of the annual value of such property according to the valuation roll, such assessment to be a charge upon the immovable property, and the owners thereof to be personally liable therefor. No copy of the by-laws was attached to the case, but it was assumed throughout the argument that they had been made in due form. Art. 362 exempts certain immovable property from the ordinary and annual assessments. Then follows the critical art. 362a.

(1) [1916] 2 A. C. 569. (2) Ibid. 573.

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It is not necessary to set this section out again, but the persons on whom the tax is imposed under its provisions are persons occupying for commercial or industrial purposes buildings or lands belonging to His Majesty, that is to say, occupants, and not owners. The taxation is imposed as an annual charge or rate, and the occupant is made liable to pay on an annual assessment. The assessments in question in this appeal are annual assessments, as shown in the exhibits of the tax account, and by the extracts from the valuation and assessment roll of immovable property.

The question raised in this appeal is, however, in the main dependent on the further enactment that the occupants shall be taxed as if they were the actual owners of immovables and shall be held to pay the annual and special assessments, the taxes, and other municipal dues. The effect of this is that the occupants are made liable to pay on an annual assessment, not to exceed 1 per cent. of the capitalised value of the occupied property. The method of assessment determines the amount for which an occupier is liable during his occupancy, but does not alter the incidence of the taxation or transfer the incidence from the occupant to the owner. There is no suggestion that the assessment, in the case under appeal, has not been fairly ascertained, or that there has been any attempt to differentiate between the tenants of the Crown lands and the tenants of private individuals or Corporation, to the disadvantage of the Crown tenants.

The ultimate incidence of taxation imposed on tenants, as the occupants of lands, is a matter on which economic experts have expressed different opinions. If, however, municipal taxation is to be regarded as ultra vires, on the ground that the ultimate incidence of taxation, or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could be validly imposed. The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him during the period of

his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under art. 362a of the Charter affecting either the land or the Crown. In the case under appeal the tenant is paying an annual rental of $2184, but is assessed at an annual aggregate charge, including school taxes, of $405, which is somewhat less than one-fifth of the rental.

In assessing the annual interest for taxation of an occupant of land, every occupant is assessed as the person for the time being in beneficial occupation of the land taxed. Any method of assessment, based on variations in the duration of tenure, would inevitably result in an unequal distribution of the tax burden and, if applied to the occupants of Crown lands, would unfairly increase the burden on the occupants of lands owned by private individuals or corporations.

Their Lordships in this respect agree with the reasons given in the judgment of Meredith C.J.O. in *In re Town of Cochrane and Cowan.* (1) He said: "I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based on that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land."

The only remaining question is one of procedure. In the present case an action was brought for recovery of the amount

(1) 50 Ont. L. R. 169, 173.

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due, and no objection was raised to this form of procedure. In addition the provisions to recover arrears of taxation by distress of the goods and chattels of the person bound to pay the same, and of all goods and effects in his possession in whatever place such goods and effects may be found, saving the exemptions provided by law under art. 287 of the Charter, would in ordinary cases be available against a tenant of the Crown in the same way as against any other tenant. The provision in s. xviii. of the Charter would not be available against Crown property, but it has not been attempted to enforce this provision.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench set aside, and that the judgment of the Recorder of the City of Montreal should be restored. The Attorney-General for Canada will pay the appellants' costs. There will be no costs of the intervener, the Attorney-General for Quebec.

Solicitors for appellants and intervener: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

WARD AND COMPANY, LIMITED . . APPELLANTS ; J. C.* 1922 Nov. 16.

AND

COMMISSIONER OF TAXES . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

New Zealand—Income Tax—Assessment—Deductible Expenditure—Brewery Company—Anti-prohibition Propaganda—Land and Income Tax Act, 1916 (7 *Geo.* 5, *No.* 5), *s.* 86, *sub-s.* 1 (*a*).

A poll of the voters in New Zealand being about to be held under statutory authority on the question whether or not prohibition of intoxicants should be introduced, a brewery company carrying on business in New Zealand expended money in printing and distributing anti-prohibition literature. The poll resulted in a small majority against prohibition. The company sought to deduct the expenditure in the assessment of the income derived from their business for the purposes of the Land and Income Tax Act, 1916, of New Zealand. By s. 86, sub-s. 1 (*a*), of that Act no deduction is to be made in respect of expenditure "not exclusively incurred in the production of the assessable income" :—

Held, that the company was not entitled to make the deduction having regard to s. 86, sub-s. 1 (*a*), above mentioned.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment (July 25, 1921) of the Court of Appeal of New Zealand upon a case stated under s. 35 of the Land and Income Tax Act, 1916, of New Zealand.

The question raised by the case was whether upon the assessment under the above Act of the income which the appellants derived from their business for the year ending March 31, 1920, they were entitled to deduct expenditure the nature of which appears from the judgment of the Judicial Committee. The Court of Appeal had held that the Commissioner of Taxes had rightly rejected the deduction as one which could not be made having regard to s. 86, sub-s. 1 (*a*), of the Act. The terms of that provision appear from the headnote, and from the judgment.

1922. Oct. 24. *Maugham K.C.* and *Stamp* for the appellants. The Court of Appeal wrongly construed s. 86,

* *Present :* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD CARSON.

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sub-s. 1 (*a*). Having regard to the periodical polls provided for by the licensing laws of New Zealand, the expenditure was a necessary and continuing part of the ordinary trade expenditure of the appellants. It was part of the cost of securing a renewal of their licences to carry on their trade. The expenditure did not differ in kind from that on insurances and advertising. It was not a capital expenditure, and was properly debited against profits in the balance sheet. [Reference was made to *Usher's Wiltshire Brewery* v. *Bruce* (1); *Smith* v. *Lion Brewery Co.* (2); *Moore* v. *Stewarts & Lloyds* (3); and *Moffatt* v. *Webb.* (4)]

Latter K.C., *Farwell* and *Moulsey* for the respondent. The expenditure was not "exclusively incurred in the production of the assessable income"—namely, the income for the year of assessment. There was no finding by the Commissioner that the expenditure was of that character, or even that it was a necessary expenditure for the protection of the business. The decisions of the House of Lords relied on by the appellant proceeded upon findings of fact of that kind. The expenditure was incurred in order to guard against the extinction of the business, and was therefore an application of profits earned for the purpose of earning future profits. Cost of production does not include the cost of keeping the business alive; the phrase includes only the immediate cost: *Strong & Co.* v. *Woodifield.* (5) It is not sufficient that the expenditure could be treated as a debit in the profit-and-loss account. [Reference was also made to *Inland Revenue Commissioners* v. *von Glehn* (6); *Moore & Co.* v. *Hare* (7); and *Ounsworth* v. *Vickers.* (8)]

Maugham K.C. replied.

Nov. 16. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal from a judgment of the Court of Appeal of New Zealand upon a case stated

(1) [1915] A. C. 433.
(2) [1911] A. C. 150.
(3) (1906) 8 F. 1129.
(4) (1913) 16 C. L. R. 120.
(5) [1906] A. C. 448, 453.
(6) [1920] 2 K. B. 553, 567.
(7) 1915 S. C. 91.
(8) [1915] 3 K. B. 267.

under s. 35 of the Land and Income Tax Act, 1916. The question to be determined is whether under that Act a sum of 2,123*l.* 3*s.* 11*d.* expended by the appellants in the tax-year ending on March 31, 1919, in connection with a special licensing poll taken on April 30, 1919, was a permissible deduction in computing the assessable income derived by the appellants from their trade or business of brewers and maltsters.

The following provisions of the Land and Income Tax Act, 1916, are material: "8 (1.) For the purposes of the assessment and levy of income-tax every taxpayer shall in each year furnish to the Commissioner a return in the prescribed form setting forth a complete statement of all the assessable income derived by him during the preceding year, together with such other particulars as may be prescribed.

"79. (1.) Subject to the provisions of this Act, there shall be levied and paid for the use of His Majesty in and for the year commencing on the first day of April, nineteen hundred and sixteen, and in and for each year thereafter, a tax herein referred to as income-tax. (2.) Subject to the provisions of this Act, such tax shall be payable by every person on all income derived by him during the year preceding the year in and for which the tax is payable.

"85. Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary: (*a*) All profits or gains derived from any business: . . . . "

"86. (1) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters: (*a*) Expenditure or loss of any kind not exclusively incurred in the production of the assessable income derived from that source. . . . ."

The poll in question was taken under the Licensing Amendment Act, 1918, which provided for the taking of a special poll of the parliamentary electors of New Zealand

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upon the question whether the sale of intoxicating liquors should be prohibited throughout New Zealand. The Act also provided that in the event of a poll resulting in the defeat of the proposal for prohibition, further polls upon the same question might be taken once in every three years. The poll in question in this case was fixed for April 30, 1919; and, with a view to defeating the proposal for prohibition, the appellants in the tax-year 1918–19 incurred an expenditure amounting to the above sum in canvassing, advertising, printing, and other matters. The poll resulted in a narrow majority against prohibition.

For the purpose of assessing the appellants for income tax for the year 1919–20, the Commissioner of Taxes required them to make a return of their income for the year ending on March 31, 1919, and the appellants in this return claimed to deduct from their assessable income the above sum of 2,123*l.* 3*s.* 11*d.* The Commissioner disallowed the deduction, and on a case being stated under s. 35 of the Act, the matter was referred to the Court of Appeal, which affirmed the decision of the Commissioner. Hence the present appeal to His Majesty in Council.

It will appear from the above statement that the question of law to be determined is whether the expenditure in question was or was not "exclusively incurred in the production of the assessable income" derived by the appellants from their business in the tax-year 1918–19. In considering that question, their Lordships put aside the circumstance that the expenditure was not of such a nature as to produce income in the actual tax-year in which it was incurred. In every trade, much of the expenditure in each year—such as expenditure in the purchase of raw material, in the repair of plant or the advertisement of goods for sale—is designed to produce results wholly or partly in subsequent years; but, nevertheless, such expenditure is constantly allowed as a deduction for the year in which it is incurred. The real question is whether the expenditure in question was, within the true meaning of s. 86, sub-s. 1, of the Act of 1916, exclusively incurred in the production of assessable income; and after

fully considering the arguments adduced, their Lordships are of opinion that this is not made out.

The conclusion of the Court of Appeal upon this point is contained in the following passage in the judgment of that Court: "The question, therefore, is: Was the expenditure under consideration exclusively incurred in the production of the assessable income, for unless it was so, the Act expressly prohibits its deduction from such income. This question must, we think, be answered in the negative. We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the Company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the Company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands."

Their Lordships agree with this reasoning. The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a

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place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86, sub-s. 1 (*a*), of the Act. For that purpose it must have been incurred for the direct purpose of producing profits. The conclusion may appear to bear hardly upon the appellants; but, if so, a remedy must be found in an amendment of the law, the terms of which are reasonably clear.

It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision.

For these reasons, their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.* 1922 *July* 28; *Nov.* 10.

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM SPECIAL BOARD OF ARBITRATION, CANADA.

Arbitration—Railway—Transfer as going Concern—Value of Company's Stock—Evidence—Earning Capacity—Cost of Replacement.

In connection with the transfer of the Grand Trunk Railway to the Government of Canada as a going concern, the Government and the appellant railway company entered into an agreement, confirmed by a Dominion statute, whereby a Board of three arbitrators was to determine "the value, if any, to the holders thereof, of the preference and common stock" of the company; an appeal to the Privy Council was provided for upon any question of law if the arbitrators were not unanimous. The arbitrators unanimously came to a preliminary decision that the

* *Present:* VISCOUNT BIRKENHEAD L.C., VISCOUNT CAVE, LORD SHAW LORD PARMOOR, and LORD CARSON.

value of the stock should be determined on the basis of the net earning capacity of the railway, and that principle was accepted by all parties concerned. By a majority the arbitrators held that evidence of the value of the physical assets, whether the selling value or the cost of replacement, was not admissible, and a majority award was made after the exclusion of evidence of that description. It was contended that the cost of replacing the assets was material, among other reasons, because under legislation in the United States, in which about a third of the length of the railway lines was situate, regard was to be had to the aggregate value of railway property in certain groups in fixing maximum rates of freight :—

Held, that having regard to the principle upon which the value was being ascertained, the excluded evidence was not material or admissible ; it was not established that the United States legislation above referred to resulted in there being a relation between the cost of replacement and net earning capacity.

APPEAL, by special leave, from the majority award of arbitrators appointed to value the preference and common stock of the Grand Trunk Railway Company under an agreement between the Minister of Railways and Canals of Canada, and the said Railway Company, dated March 8, 1920, confirmed by 10 & 11 Geo. 5 (Dom.), c. 13.

The appeal was on questions of law arising upon a majority decision contained in an interlocutory award dated February 7, 1921, certain interlocutory rulings made in the course of the proceedings, and the final award, with judgments giving reasons, dated September 7, 1921.

Special leave to appeal was granted on December 21, 1921.

The material facts are fully stated in the judgment of the Judicial Committee.

1922. July 10, 11, 13. *Sir John Simon K.C.*, *Wilfrid Green K.C.*, and *Atwater K.C.* for the appellants. The value of the physical assets of the railway company as a whole was material and should not have been excluded. The value to the stockholders was the value of the undertaking to the aggregate of individuals, subject to prior charges. Though the value to be ascertained was the value to the sellers, yet in ascertaining that value it was relevant to see what a purchaser would give sooner than construct a line. The consideration that a purchaser would be difficult to find may make it necessary to discount the figure so arrived at, but does not

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make it immaterial. Absence of an immediate prospect of dividend is not the same as absence of value; it is also fallacious to treat selling value as irrelevant because the company could not sell. The legislation of the United States as to maximum rates made the physical value relevant to earning capacity. About 67 per cent. of the revenue of the company was shown to be governed directly or indirectly by the rates fixed in the U.S.A. Secondly, the majority award was invalid in that Cassels J. in his judgment relied on the Drayton-Acworth report, which was not in evidence.

Clauson K.C., *Newcombe K.C.* and *Tilley K.C.* for the respondent. The evidence which was excluded was not essential, nor would it have been useful. It was conceded that evidence was admissible of the selling value of any particular asset as to which it was shown that a sale would have been possible and the most advantageous way of treating it in the interest of the shareholders. For instance evidence of the selling value of certain coal properties was admitted. Evidence of what it would cost now to reproduce the assets generally was properly excluded. The railway undertaking had to be treated as a going concern; the company could not sell the assets. The basis of valuation was the earning capacity, present and potential, of the railway. The arbitrators were satisfied that the question of statutory maximum rates in the United States would not affect the amount of the award. There was a technical irregularity in referring to the Drayton-Acworth report, but the facts relied on by Cassels J. from that report appeared also in documents duly before the arbitrators. [Reference was made to *Smyth* v. *Ames* (1) and *Simpson* v. *Shepard*. (2)]

Sir John Simon K.C. in reply. The majority of the arbitrators wrongly considered that the only criterion of value was earning capacity. The appellants are entitled to a rehearing: *Wright* v. *Tatham* (3), following *Crease* v. *Barrett* (4); see also *Barber & Co.* v. *Deutsche Bank*. (5)

(1) (1897) 169 U. S. 466, 547.
(2) (1913) 230 U. S. 352.
(3) (1837) 7 Ad. & E. 313, 330.
(4) (1835) 1 C. M. & R. 919.
(5) [1919] A. C. 304.

July 28. THEIR LORDSHIPS stated that, for reasons to be given subsequently, they would humbly advise His Majesty that the appeal should be dismissed.

Nov. 11. The reasons of their Lordships were delivered by

VISCOUNT BIRKENHEAD. This is an appeal by special leave from the award, dated September 7, 1921, of a Tribunal of Arbitration created by an agreement, which was confirmed by statute, for the purpose of determining the value of the preference and common stocks of the appellant company for the purpose of the acquisition of the Grand Trunk Railway system by the Canadian Government.

The appellant company was founded in 1852 under a Canadian Charter, and was the pioneer of the great railway systems of Canada. It was financed wholly by British capital and the Board of Directors has always met in London. The stock, which is largely held in England, is all fully paid up.

The company from time to time extended its sphere of operations, so that by the date of the agreement in 1920 the Grand Trunk Railway System, which begins at Montreal, consisted of about 4800 miles of railway, with services to Chicago, New York, Boston, Portland in Maine, New London in Connecticut, and with many places on the Great Lakes. The system also included steamship lines, ferries, bridges, elevators, terminal facilities, hotels, etc., used in conjunction with the railways. These enterprises were either vested in the company, or in subsidiary companies which the company controlled either by the direct or indirect ownership of the shares or a majority of them, or by means of leases. The Vermont Central Railway, though controlled and largely owned by the company, was not a part of the system, but including that railway, some 1700 miles of the tracks owned or controlled by the company are in the U.S.A., and about 67 per cent. of the rate receipts are said to be directly or indirectly affected by the rates prevailing in the U.S.A.

In 1904 the Grand Trunk Pacific Railway Company, which was wholly owned by the appellant company, was formed

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for the purpose of carrying out an agreement with the Canadian Government, whereby that Government undertook the construction of a railway line called the Transcontinental Line from Quebec to Winnipeg, and the Grand Trunk Pacific Company was to complete the line from Winnipeg to Prince Rupert on the coast of British Columbia. These lines, when completed, were to be operated by the Grand Trunk Pacific. There were also formed two other companies, the Grand Trunk Pacific Branch Lines Company and the Grand Trunk Pacific Development Company, both of which were to be controlled by the appellant company, and to be operated so as to conduce to the success of the scheme.

The lines so projected were completed by 1916, but the cost was so great that the Pacific Company refused to operate the Transcontinental line. As it had access to Winnipeg by the Grand Trunk system and the Transcontinental line, the appellant company was able to operate a through line from Montreal to Prince Rupert. The Grand Trunk Pacific never was able to meet its operating expenses, and, after various sums had been granted by the Canadian Government for its assistance, the dates and amounts of which are not material, that Government was notified early in 1919 that the Pacific Company could no longer operate, and the Grand Trunk Pacific system was taken over by a Government Receiver. Since that date the deficit has increased.

In 1916 a Commission known as the Drayton-Acworth Commission was appointed by Order in Council to inquire into the whole railway position. It reported in favour of the Government taking over the Grand Trunk system on certain terms, but negotiations along those lines failed.

Subsequently the Grand Trunk Railway Acquisition Act, 1919 (10 Geo. 5, c. 17), was passed enabling the Government to negotiate and enter into an agreement to acquire the entire capital stock (except the 4 per cent. guaranteed stock) of the appellant company upon terms to be arranged under the agreement. At that date and at all material times, the stock of the appellant company amounted to 49,573,492*l.*, divided as follows :—

	£
4 per cent. guaranteed stock	12,500,000
First preference 5 per cent. stock ..	3,420,000
Second preference 5 per cent. stock ..	2,530,000
Third preference 4 per cent. stock ..	7,168,055
Common stock	23,955,437
	£49,573,492

The outstanding debenture stock amounted to 31,926,125*l.*

Following upon the Act of 1919, an agreement was entered into between H.M., represented by the Minister of Railways and Canals, and the appellant company acting by virtue of a meeting of shareholders and debenture stockholders held on February 19, 1920.

This agreement was, with a slight variation, confirmed by the Act 10 & 11 Geo. 5, c. 13. Clause 1 and the first schedule of the agreement, as varied by s. 1 of the Act 10 & 11 Geo. 5, c. 13, defined the "Grand Trunk system." By clause 2 the company undertook to use its best endeavours to cause the sale and delivery to the Government of the preference and common stocks then issued and outstanding. These stocks amounted to the nominal value of 37,073,492*l.* By clause 3 the Government undertook to guarantee the payment of dividends on the guaranteed stock and of interest on the debenture stock, the guarantees to take effect on the appointment of a committee of management (provided for by clause 4), and forthwith on such appointment to be deposited with the High Commissioner for Canada in England. Upon such deposit being made, the voting powers of the holders of guaranteed and debenture stocks were to cease. By clause 4 a committee of management was to be appointed to act until the preference and common stocks were transferred to or vested in the Government, when the committee was to be discharged. Clauses 6, 7, 8 and 11 are in the following terms: "The value, if any, to the holders thereof, of the preference and common stock shall be determined by a Board of three Arbitrators"; and then, following upon the provision for appointing these arbitrators: "The board of arbitrators shall have full power

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and authority in respect of the control of the arbitration and the proceedings thereof, including the administration of oaths and in respect of the admission of evidence. The award shall be made by the arbitrators, or a majority of them, within nine months from the appointment of the arbitrators, or within such further time as the Governor in Council may approve. The unanimous award of the arbitrators shall be final, but should the award not be unanimous, and should notice of appeal be given by either party to the other within thirty days after the making of the award, an appeal therefrom, upon any question of law, shall lie . . . . to the Judicial Committee of the Privy Council, if leave be granted by the said Committee. . . . . The value, if any, so determined shall not be greater than an amount on which the annual dividend at 4 per cent. per annum on the aggregate face value of the present guaranteed stock and the new guaranteed stock taken together would be £5,000,000 ; that is, the value, if any, so determined shall not exceed $64,166,666.66. The fixing of this limit shall not be taken by the arbitrators as any admission or indication that the value to be determined is the amount so fixed, or any other amount."

By clause 12 the company, upon the final determination of the value of the preference and common stocks, was to create non-voting 4 per cent. capital stock, to be called " new guaranteed stock," to the amount of the value so determined less such deductions as were authorized by the agreement. This stock was to be guaranteed by the Government and distributed among the holders of the preference and common stocks upon the transfer to or vesting in the Government of such stocks, in proportions to be determined by the arbitrators. By clause 13 the new guaranteed stock was to be issued in exchange for the preference and common stocks. If these stocks or any part should not be transferred, power was given to declare the same to be vested in the Government, and then the new guaranteed stock in respect of such stocks was to be issued to the holders thereof on due application being made. By clause 19 for the purposes of the valuation, the obligations of the company as guarantors of any indebtedness of the

Grand Trunk Pacific Railway Company, or of the Grand Trunk Pacific Branch Lines Company, or otherwise, and the claims of the Government against either of those companies or any company forming part of the Grand Trunk Railway system were not to be treated as extinguished or affected by anything in the Act of 1919.

By clause 20, in the event of the arbitrators considering that the market prices or quotations of the stocks were to be taken into consideration in establishing their value, they were not to take into account the fluctuations, if any, in the market prices or quotations caused by the negotiations or by the passing of the Act of 1919 or the execution of the agreement, but this provision was not to be taken to mean that the market prices or quotations were relevant matters to be inquired into by the arbitrators.

After the arbitration was commenced, provision was made for extending the time for award on certain terms embodied in an agreement dated May 13, 1921, and confirmed by the Act 11 & 12 Geo. 5, c. 9.

The arbitrators selected for the purpose of the valuation were Sir Walter Cassels, Judge of the Court of Exchequer in Canada, who acted as chairman, Sir Thomas White, who was named by the Canadian Government, and the Hon. William H. Taft (now Chief Justice of the U.S.A.), who was appointed by the company.

The arbitrators sat and heard evidence and arguments for over eighty days. A vast amount of evidence was given as to the company, its history, earnings, speculations and potentialities. During the course of the arbitration certain other evidence as to value of the appellant company's physical assets was tendered on behalf of the appellant company and rejected by a majority of the arbitrators for reasons stated in an interlocutory judgment dated February 7, 1921, and on September 7, 1921, the majority made an award that the stocks in question had no value, for reasons which they gave. The Hon. William H. Taft dissented, and assessed the value of the stocks at $48,000,000. Notice of appeal was given on behalf of the appellant company on October 1, 1921, and

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on December 22, 1921, by Order in Council, the appellant company was given leave to appeal from the award, and from the interlocutory decision of February 7, 1921.

The first and principal question to be determined is whether the arbitrators, in excluding evidence as to the physical assets of the company, were wrong in law; and, in considering this point, it is important to bear in mind both the question which the arbitrators had to determine and the principles on which they proceeded. The figure to be fixed by the arbitrators was (in the words of the agreement) the "value, if any, to the holders thereof, of the preference and common stock"; that is to say, of stock which ranked after debenture and guaranteed stock, aggregating 44,426,000*l.*, and after the other obligations of the company. The valuation was necessarily to be made on the footing that the railway was taken over and would be carried on as a going concern; for a break up and sale of the assets was negatived by the statute law of Canada, and would have been contrary to the rights of the holders of prior securities. This being so, the arbitrators had to consider at an early stage of their proceedings upon what basis the valuation was to proceed. They arrived at the unanimous conclusion that the value of the stock was to be ascertained on the basis of the net earning capacity, both actual and potential, which should then be capitalised.

This conclusion was expressed by the chairman (Sir Walter Cassels) on the second day of the proceedings as follows: "The agreement contemplates the continued operation of the railway system. The liabilities of the debenture stocks of the railway and other liabilities of the railway have been assumed. To have a valuation as if the system were disintegrated and broken up is to my mind not permissible. The true method of arriving at the value of the stock is in my judgment to ascertain the earnings of the railway in the past, properly applicable to dividends, and the potentialities of the future."

Mr. Taft, the second arbitrator, clearly expressed the same view: "The whole stock of the railway (he said) is valuable or otherwise as the ownership and control of the physical

property of the railway as a going concern in the discharge of its public duties will enable it to earn a sufficient amount to pay dividends on the stock. We are, therefore, to capitalise its net earning capacity, present and potential, and fix the value of the stock on that basis."

Sir Thomas White, the third arbitrator, stated the conclusion in the following terms: "To determine the question at issue, it is necessary first to consider the subject matter of the arbitration reference. This is, in the language of the statute, 'the value, if any, to the holders thereof, of the preference and common stock' of the Grand Trunk Railway Company as of the date fixed. If the system of the company is to be operated as a going concern, the value of the stock to its shareholders will depend upon the net earnings, present and prospective, of the system. All evidence bearing upon this question is admissible. It is not suggested that the value of the shares should be determined by considering the disintegration of the system, the sale of the assets piecemeal, payment of the debts and distribution of any surplus to shareholders. No such suggestion has been put forward. It is common ground that the property of the system, so long as needed for railway purposes, cannot be disintegrated and sold; the system must be regarded as a going concern. . . . . The Grand Trunk Railway system is in reality an undertaking having a perpetual franchise. Having such a franchise, and being compelled to operate, the value of its shares must depend upon estimated actual and potential earnings of the system."

The basis of valuation so adopted by the arbitrators (which was certainly not unfavourable to the company) was accepted by all persons concerned, and was not, and could not be, impeached on the present appeal. It must, therefore, be taken as the governing principle upon which the arbitration was to proceed; and the question is: Whether, having regard to this principle, evidence as to the value of the physical assets was or was not material and admissible?

This expression, "the value of the physical assets," was used in the course of the arguments (both before the arbitrators and before their Lordships) in two different senses, which it

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is necessary clearly to distinguish. At one time the claim appeared to be that evidence should be admitted of the selling value of the physical assets of the company, that is to say, of the price at which the tangible assets (land, buildings, rails, rolling stock, terminals, etc.) could be sold: at other times it was contended that the evidence to be admitted was evidence as to what is variously described as the "reproduction" or "reconstruction" or "replacement" value of those assets, by which is meant the cost at which they could have been reproduced at the moment of transfer, subject (apparently) to allowance for depreciation. These two alternative contentions must be dealt with separately.

The contention that evidence of selling value should have been received is, in their Lordships' opinion, contrary to the basis of valuation adopted by the arbitrators, and, indeed, to the whole meaning and effect of the agreement for transfer. The transfer was a transfer of a going concern which the holders of preference and common stock had no power to sell, either piecemeal or as a whole. Such a sale was forbidden by the statutes under which the company was operating; and if an attempt had been made by these stockholders to bring it about, the holders of debenture and guaranteed stock would have been entitled to intervene and forbid it. The question whether a purchaser could be found seems not to have been considered, and it is to be noted that there was no evidence, nor was it even contended, that it would have been more advantageous to the stockholders to disintegrate the system or to sell the assets piecemeal, even if that were lawful. No scheme was ever put forward with a view to any such proposition, nor apparently had the directors even considered such a proposal.

A sale was, therefore, out of the question, and the plain duty of the arbitrators was to value the preference and common stock as stock in a continuing and profit-bearing concern; this being so, it is difficult to see how evidence of selling value could be material. If, indeed, it had been alleged that certain tangible parts of the assets could be sold at a price without producing an equivalent or greater reduction in the

value of the undertaking as a whole, different considerations would have arisen; but counsel for the company, although repeatedly invited by the arbitrators to state whether they put forward such a contention, declined to do so. It should be added that the ruling did not exclude evidence of the selling value of such assets as were not necessarily to be considered as being used by the railway as a going concern, e.g., land grants and coal properties; and there is no doubt, also, that evidence of the cost and physical condition of the rolling stock and other physical assets, and of their suitability for the purposes of the undertaking was admissible. In fact, such evidence was freely admitted. But evidence of selling value stood on a different footing, and was (their Lordships think) rightly excluded. It should be added that this contention, although at times put forward, was never strongly pressed, and was indeed at times disclaimed by counsel who appeared for the company before the arbitrators, possibly because a valuation on the basis of selling value would have been disastrous for the stockholders, and also that the arbitrators were unanimous in rejecting this contention.

It was upon the alternative form of this contention—namely, that evidence of replacement value should be admitted—that the arbitrators differed in opinion, Mr. Taft holding that such evidence was admissible, and the majority of the Board taking a different view. This contention has now to be dealt with. The relation between cost of reconstruction and profit-earning capacity is not at first sight apparent. The earnings of a railway system will depend mainly upon its location, the traffic available, the soundness and suitability of the line, rolling stock and other assets, and the economy and efficiency of the management. Speaking generally, they are in no way dependent on the question what it would now cost to construct and equip the line. Mr. Taft was of opinion that the evidence was admissible for two reasons. First, to enable the arbitrators to use the value as a circumstance in judging the future and potential earning capacity. He does not say how this is to be worked out. Assuming, for example, that the arbitrators had found that the line was absolutely insolvent, unable to

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continue to discharge its obligations or, in fact, to keep open or avoid a receiver, how could the replacement value of the assets add to or detract from the value of the stock ? Assuming, on the other hand, a railway system constructed at a cost which was small in comparison with the returns earned by it as a going concern. Could it be material to show what was the replacement cost as a matter affecting the value of the stock ? Is there, indeed, any way in which such evidence could or should modify or assist the estimate of value, once you have determined upon the principle adopted by the arbitrators ?

But, in the second place, it was also sought to establish a relation between the replacement cost and future earnings by reference to the statute law of the United States.

By the Inter-state Commerce Act, 1920, of the United States (which was passed after the date of the agreement now under consideration), the principle is laid down that the American Inter-state Commerce Commission in fixing the maximum rates to be charged on the United States railway systems shall have regard to the aggregate value of railway property as a whole, or as a whole in such rate groups as the Commission may form, and shall prescribe such rates as may secure a fair return upon such aggregate value. It is argued that the effect of this statute is to make physical value (or replacement cost) a factor in the determination of rates—directly, as to such part of the Grand Trunk system (some 1700 out of 4800 miles) as is situate in the United States, and indirectly as to the remainder which is in Canada. The argument is formulated in the powerful dissenting judgment delivered by Mr. Taft : " The rule of fair return on necessary value invested is the rule of the Government of the United States, and a considerable part of the lines of the Grand Trunk Railway is within the jurisdiction of that Government. The matter of fixing rates was originally left to the discretion of the Inter-state Commission of the United States with the direction only that the rates fixed should be reasonable. But the result was that the rates fixed by the Commission were not high enough to enable the railways to prosper, and

that the system came near to a complete breakdown. Congress, therefore, passed a law which adopted specifically the principle that the public service rendered by railways would be compensated for by rates which shall secure a fair return upon the railway property used in the service of transportation under earnest, efficient and economical management. The Commission is to form railways into groups serving the same zone of territory, and then ascertain the aggregate value of all the railways in the group and fix the rates to secure a fair return on the aggregate. This is to fix the rates according to the average physical value of the existing railways engaged in the service, which is only an alternative method of determining the amount of capital needed to reproduce a railway which could render the service efficiently and economically, assuming that the average value of all railways engaged in the service would be the cost of such a new railway. If it differs from that cost, it must be greater, and so is more liberal to the railways. My reference to the new Transportation Act of Congress, it is suggested, is without weight, because such groups of railways have not yet been formed by the Commission and may never be. I have no doubt the Commission will proceed to execute the law as directed. Meantime, under the inspiration of the Act, and more certainly to secure a return on the immediate investment, the Commission has increased the traffic and passenger rates most substantially, and, as I understand it, the Canadian Commission has followed suit. It is not the particular method in reaching the actual present investment in railway property as the basis for fixing rates which is important; it is the fact that the principle has been recognized by the statute; and will be followed in the future. This is what makes it proper for us in trying to determine future probable rates to allow evidence of such a factor."

To this reasoning the answer put forward on behalf of the Government of Canada is twofold. First, it is said that even as regards that part of the Grand Trunk system which is situate in the United States, evidence of replacement cost would be no index to the rates which will ultimately be fixed by the Commission. Such evidence would be valueless for

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that purpose, unless supported by similar evidence as to the value of all the other railways in the United States, or, at least, of all other railways in the same group; and such evidence as to other railways was not tendered, and was probably unobtainable. And, even if this evidence could be obtained, the estimate so reached would not justify the arbitrators in making any assumption as to the valuation which will be adopted by the American Commissioners (who have other factors to take into account), or as to the rates which they will fix. Further, even if the inquiry could have been pushed so far, and some conjecture could have been formed as to the decision which would be reached by the American Commission, this figure would be no real guide to the prospective profits of the lines in the United States which belong to the Grand Trunk system. It is one thing to fix maximum rates; it is another to secure remunerative traffic at those rates, and to draw from maximum rates, themselves conjectural, any inference as to prospective profits would be unsafe and illusory.

Secondly, as regards the lines in Canada which form part of the Grand Trunk system and are of far greater importance, the argument (it was said) has even less value. The principle of the Inter-state Commerce Act has not been adopted in Canada, and there is no reason to assume that it will be there adopted. The conjecture—for it is nothing more—that the Board of Railway Commissioners for Canada will, in fixing rates in the future, have regard to the replacement cost of railway property is not supported by any evidence. Even if it were to happen, the above reasoning as to the effect of the principle on the United States would have equal force with regard to Canada. This aspect of the question is thus dealt with in the interlocutory judgment of Sir Thomas White: "In Canada traffic rates are under the control of the Board of Railway Commissioners. There is nothing before us to show, nor am I aware, that the Board in fixing rates is obligated to consider the reproduction value of railway property. Nor do I understand that the Board has ever laid down the principle that such value has any bearing upon

the question of Canadian railway rates. Even if, in determining such rates, the Board should decide to have regard to reproduction value of railway property, evidence as to the value of the physical assets of an individual railway undertaking would not be useful for the purpose unless supplemented by evidence of the value of the physical assets of its competitors. It would, in my view, be idle for this Board of Arbitrators to attempt to draw conclusions as to probable future traffic rates in Canada from a consideration of a reproduction valuation of the physical assets of this one railway system. Further, I can think of nothing more improbable than that the Board of Railway Commissioners of Canada will, in fixing future rates, regard as a factor to be taken into account the reproduction values of the railway properties, either in whole or by groups, of the Canadian Pacific, the Grand Trunk and the Canadian National Railway systems."

The above reasoning which weighed with the arbitrators in rejecting the evidence tendered, was reinforced in the course of the inquiry by evidence of the results actually obtained during the period for which the American statute had been in operation. It was proved that the Inter-state Commerce Commission, to which was entrusted the duty of putting the Inter-state Commerce Act into operation, had, after much controversy, divided the American railway systems into three groups, had estimated (not on reproduction cost but on book values) the value of the lines in each group, and on that footing had approved certain increased maximum rates. The result of these increases on the operation of the American lines forming part of the Canadian Grand Trunk system during the period from January till April, 1921, was put in evidence, and showed a heavy deficit. The arbitrators had these figures before them when they formed (by a majority) their interlocutory decision to reject the evidence in question.

Upon the whole matter, their Lordships have come to the conclusion that any attempt to estimate future profits by reference to selling value or replacement cost was doomed to failure, and, accordingly, that the arbitrators, to whom the agreement gave wide discretion as to the admission of evidence,

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were justified in refusing to embark upon an inquiry, which must have occupied many months, and the result of which, when obtained, would have had no legitimate bearing on the question which they had to determine.

The view here adopted involves no criticism of the American cases (referred to by Mr. Taft), in which evidence of value has been accepted; for those decisions were given with reference to a different subject matter, and under a different system of law. The cases cited from the British reports have no bearing on this case.

The second legal objection raised by the appellant company to the award was founded upon the circumstance that the chairman, Sir Walter Cassels, in his reasons for the award relied upon certain evidence of Mr. E. J. Chamberlin, the president of the company, which was given before the Royal Commission of Railways and Transportation in Canada, and was not repeated or made evidence in this arbitration. This is undoubtedly the fact. But the material facts and figures so deposed to by Mr. Chamberlin are all to be found in correspondence between Mr. Chamberlin and Sir A. Smithers, in a letter of Mr. Kelly, the vice-president of the company, and in other documents which were duly made evidence in this arbitration. Sir Thomas White, who made no reference to Mr. Chamberlin's evidence, arrived upon this other material at the same conclusion as that which was reached by the chairman. In these circumstances, their Lordships have anxiously considered whether they should advise His Majesty to set aside the award on the ground of the chairman's action. They have arrived at the conclusion that they ought not to take that course. It is plain that, if no reference had been made to Mr. Chamberlin's evidence, the majority of the arbitrators would have arrived at the same conclusion and upon the same materials. If the award were set aside and remitted to the arbitrators on the ground of the reference by the chairman to that evidence the only result would be to cause great expense and delay to all parties without any reasonable prospect that the arbitrators would arrive at a determination different from that which they have already decided.

It is perhaps hardly necessary to add that their Lordships have neither the right nor the duty to inquire into the merits of the award made by the arbitrators. Under the statute which confirms the agreement, they have only jurisdiction to deal with the points of law raised before them and to determine whether the arbitrators so erred in law that their award should be set aside.

For the reasons above given, their Lordships feel constrained to answer this question in the negative, and they will humbly advise His Majesty that this appeal fails and should be dismissed.

Solicitors for appellants: *Batten, Proffitt, Scott & Weddell.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

ALBRIGHT . . . . . PETITIONER;

AND

HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, AND OTHERS . } RESPONDENTS.

J. C.* 1922 *Nov.* 30.

Judicial Committee—Practice—Special Leave to appeal—Supreme Court of Canada—Construction of Agreement.

It is not the practice of the Judicial Committee to grant special leave to appeal from a judgment of the Supreme Court of Canada where the decision depends upon the mere construction of an agreement, and does not raise either a far-reaching question of law or matters of dominant public importance.

Accordingly, special leave refused to appeal from a majority judgment of the Supreme Court of Canada, reversing a majority judgment of the Supreme Court of Ontario, Appellate Division, and restoring the judgment of the trial judge for $93,359, and interest, the petitioner's liability depending solely upon the true construction of an agreement between the parties, as to which there had been an equal division of opinion among the judges of the Courts in Canada before which the case had been argued.

PETITION for special leave to appeal from a judgment of the Supreme Court of Canada (May 2, 1922) reversing a

* *Present:* VISCOUNT HALDANE, LORD SHAW, and LORD PARMOOR.

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judgment of the Supreme Court of Ontario, Appellate Division, and restoring the judgment of Orde J. at the trial of an action.

By an agreement dated April 12, 1917, the petitioner agreed to sell to the respondents, the Hydro-Electric Power Commission of Ontario (a statutory body) ninety per cent. of the stock in the respondent company, the Ontario Power Company of Niagara Falls, and such further portions of the said stock as he could procure. It was one of the terms of the agreement that the petitioner should leave in the hands of the Power Company a sum sufficient to meet "the interest and sinking fund payments on the bonds of the Power Company which shall have accrued, but which shall not be due, at the time of completion."

In an action brought by the respondents against the petitioner in the Supreme Court of Ontario upon the terms of the agreement above mentioned, the trial judge (Orde J.) gave judgment against the petitioner for $93,359, and interest. The petitioner appealed to the Appellate Division, which by a majority of four to one set aside the judgment. Upon an appeal by the respondents to the Supreme Court of Canada, that Court by a majority reversed the judgment of the Appellate Division and restored the judgment of the trial judge. Of the five learned judges constituting the Court, three were in favour of reversing the judgment of the Appellate Division, one was in favour of affirming it, and one was in favour of affirming it in part.

The question of the liability of the petitioner in the action, and the extent of that liability, depended wholly upon the true construction of the term of the agreement above referred to in relation to bonds which had been issued by the Power Company.

1922. Nov. 30. *Sir John Simon K.C.* and *James Wylie* for the petitioner contended that the construction of the agreement adopted by the majority in the Supreme Court of Canada was wrong; they referred also to the large sum

involved in the litigation, and the equal division of judicial opinion in the Courts in Canada.

Hon. Geoffrey Lawrence, for the respondents, was not called upon.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case their Lordships are unable to recommend that special leave should be granted to appeal from the Supreme Court of Canada. It has been the policy of their Lordships' Board not to entertain applications which will prevent the decision of the Supreme Court being final on general questions connected with the mere construction of agreements which do not raise either far-reaching questions of law or matters of dominant public importance. Here there was an individual agreement; it may have been construed rightly or wrongly by the Supreme Court of Canada, but it is an individual agreement, and the decision turned upon a question of construction. The view taken is a view the effect of which may be obviated in future agreements by the employment of apt language. Under the circumstances their Lordships do not think that they would be justified in recommending the intervention of the Crown to entertain an appeal from the judgment of the Supreme Court. The petition will be dismissed with costs.

Solicitors for appellant : *Blake & Redden.*
Solicitors for respondents : *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1922
Dec. 8.

MINISTER FOR TRADING CONCERNS FOR THE STATE OF WESTERN AUSTRALIA AND ANOTHER . . . } PETITIONERS;

AND

AMALGAMATED SOCIETY OF ENGINEERS (AUSTRALIAN SECTION) . } RESPONDENTS.

Australia—Appeal to Privy Council—Competence—Limits of Constitutional Powers—Commonwealth Conciliation and Arbitration Act, 1904–1918—*State as Employer—Commonwealth of Australia Constitution Act,* 1900 (63 & 64 *Vict. c.* 12), *Constitution, s.* 74.

Upon a case stated by a judge of the High Court of Australia upon the hearing a summons under s. 21AA (1), of the Commonwealth Conciliation and Arbitration Act, 1904–1918, the Full Bench of Australia held that the Parliament of the Commonwealth has power under s. 51 (xxxv.) of the Constitution to make laws binding upon the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State, so as to bind a Minister of the Crown for a State acting under a statute of that State as an employer. Upon a petition for special leave to appeal from the decision of the Full Bench, and from the final order of the judge based upon it, objection was taken that an appeal was not competent having regard to s. 74 of the Commonwealth Constitution, in the absence of a certificate of the High Court under that section.

By s. 74: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and that of any State or States . . . . unless the High Court shall certify that the question is one which ought to be determined":—

Held, that special leave to appeal should not be granted.

PETITION (2) for special leave to appeal from a judgment of the Full Bench of the High Court of Australia delivered on August 31, 1920, in the matter of a reference by Higgins J. under s. 21AA of the Commonwealth Conciliation and

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW, and LORD CARSON.

(1) Enacted by Act 18 of 1914.

(2) There was a further petition for special leave, heard with the petition here reported, the petitioners being the King in the right of the State of New South Wales and the present first petitioner. This further petition raised the same questions as the petition here reported.

Arbitration Act, 1904–1918; and from an order of Higgins J. dated June 27, 1921, made under that section.

The petitioners were the Minister for Trading Concerns for Western Australia and the Attorney-General for Tasmania. The respondents, the Amalgamated Society of Engineers (Australian Section), were an organization of employees under the Act above referred to.

In December, 1919, the present respondents, having issued a plaint under s. 19 (*b*) of the Act against 844 respondents thereto, including the present first petitioner, took out a summons in the High Court under s. 21AA upon which summons Higgins J., on March 1, 1920, made an order in chambers finding that a dispute existed, as an industrial dispute extending beyond the limits of any one State, between the present respondents and most of the respondents in the proceedings, but reserving for further consideration the application so far as it affected the present petitioner, and other State officials and State trading concerns, who were respondents to those proceedings.

On the application of the present respondents, Higgins J. stated a case under s. 18 of the Judiciary Act, 1903–1910, for the opinion of the High Court of Australia whether a dispute justiciable as an industrial dispute under the Act could exist between an organization of employees and a State or State department. The case was referred to a Full Bench of the High Court, and the Attorney-General for the Commonwealth and for each of the States intervened by leave.

The Full Bench (Knox C.J., and Isaacs, Rich and Starke JJ.; Gavan Duffy J. dissenting) answered the referred questions (as amended) as follows: (1.) Has the Commonwealth Parliament powers to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes? Yes. (2.) Is the dispute which has been found to exist in fact between the claimant and the Minister for Trading Concerns, Western Australia, an industrial dispute within the meaning of s. 51 (xxxv.) of the Constitution? Yes.

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The case was argued together with a case stated by Higgins J. raising the same (and other) questions; the judgments delivered covering both cases are reported at 28 C. L. R. 129 under the title *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*

Upon the matter coming again before Higgins J. in chambers, he made an order dated June 27, 1921, whereby, pursuant to the reservation in his previous order, he decided that an industrial dispute under s. 21AA of the Act existed between the respondents and the first petitioners.

The petition stated that the petitioners desired to bring before His Majesty in Council the following questions (here stated more shortly) involved in the above decision of the Full Bench and order of Higgins J.: (1.) Whether the States of the Commonwealth of Australia are subject to laws made by the Parliament of the Commonwealth pursuant to s. 51 (xxxv.) of the Constitution of Australia with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. (2.) Whether the jurisdiction of the Court of the Commonwealth Court of Conciliation and Arbitration extends to compelling His Majesty in the right of the States to appear before the Court, and to making awards binding upon His Majesty in the right of the States. (3.) Whether the Commonwealth Conciliation and Arbitration Act, 1904–1918, or so much of it as constitutes the Court, is invalid and beyond the powers of the Commonwealth Parliament because: (*a*) the Act purports to create a Court of Judicature, but the tenure of the President and Deputy Presidents is not in conformity with s. 72 of the Constitution; (*b*) the Act contains provisions, not severable, which are beyond the powers of the Commonwealth Parliament. [Reference was made to sub-ss. 6, 9, 31, 38 (*f*), Part IV., Part V.] (4.) Whether the Commonwealth Parliament can enact freedom from taxation in certain matters, having regard to the powers of taxation of the States and s. 109 of the Constitution. (5.) Whether railways, the property of the States, are not exempt from the legislative powers of the Commonwealth, save as expressly

provided—i.e., by s. 51 (xxxi.), (xxxii.): see ss. 102, 104. (6.) Whether the decision of the Board in *Webb* v. *Outrim* (1) should not be reconsidered, in relation to certain subsequent decisions of the High Court of Australia, in order that the whole matter of the construction of the Commonwealth Constitution should be open for determination in the appeal. (2)

The petitioners had applied to the High Court to certify under s. 74 of the Constitution that the question raised ought to be determined by His Majesty in Council, but that application had been rejected.

1922. Dec. 8. *Owen Dixon K.C.* and *Wilfred Barton* for the petitioners. The questions which it is desired to raise are of great importance; the petitioners have the support of all the States. [Reference was made to the questions stated in the petition as those desired to be raised, more especially to Nos. 1, 2 and 3, and to s. 51 (xxxv.), of the Constitution, ss. 2, 12, 19, 21AA, of the Commonwealth Conciliation and Arbitration Act.] Application was made for a certificate as a precautionary measure; it is submitted that s. 74 does not apply. The question is not as to the demarcation of the constitutional powers inter se, but as to the power of the Commonwealth Parliament, and the Court set up by it, to bind the Crown in the right of the States. The question differs from that in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3) where no question of the rights of the Crown arose. Further, s. 74 does not apply to a decision of the High Court in its original jurisdiction; the High Court has so held: *In re Judiciary and Navigation Acts.* (4) Sect. 73 distinguishes between a Justice of the High Court and the High Court, and makes a judgment of the High Court final and conclusive; in s. 75, which deals with the original jurisdiction, that provision does not occur. The distinction between a Justice

(1) [1907] A. C. 81.
(2) The first three grounds were stated in the second petition.
(3) [1917] A. C. 528.
(4) (1921) 29 C. L. R. 257, 264.

J. C. 1922

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and the High Court is maintained in s. 21AA of the Conciliation Act.

Sir John Simon K.C., *Harvey K.C.* and *Hon. Geoffrey Lawrence* for the Attorney-General for the Commonwealth, intervening by leave. The proposed appeal is not competent having regard to s. 74 of the Constitution, in the absence of a certificate under that section. The first three grounds set out in the petition raise questions as to the constitutional rights inter se of the Commonwealth and States. That appears clearly from the judgment of the Board in *Jones* v. *Commonwealth Court of Conciliation and Arbitration*. (1) The constitutional powers referred to in s. 74 are not confined to legislative powers. The definition of " industrial disputes " in s. 4 of the Conciliation Act expressly includes a dispute relating to employment in industries carried on by the Commonwealth or a State. The question therefore is not as to the construction of that Act, but whether the power purporting to be exercised by the Commonwealth Parliament is limited by the constitutional power of the States in relation to employment. The other grounds set out in the petition would not arise upon the proposed appeal, but they also raise questions within s. 74. That section applies to a decision of a judge of the High Court; a decision of a judge of the Court is the decision of the Court [Reference was also made to *McCawley* v. *The King*. (2)]

Stuart Bevan K.C. and *Slesser* for the respondents.

Owen Dixon K.C. replied.

The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. Their Lordships have considered these two petitions, and particularly the statements contained in each petition as to the main points of substance upon which the petitioners desire to have leave to appeal to the King in Council. Having regard to those statements, they do not consider that these are cases in which special leave should be granted.

(1) [1917] A. C. 528. (2) [1920] A. C. 691.

Their Lordships will humbly advise His Majesty accordingly. If the respondents press for costs the petitions will be dismissed with costs, not including the costs of the Commonwealth.

Solicitors for petitioners: *Freshfields & Co.*
Solicitors for respondents: *Mills, Lockyer & Co.*
Solicitors for intervener: *Coward and Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

AMBATIELOS . . . . . APPELLANT;

AND

ANTON JURGENS MARGARINE WORKS RESPONDENTS.

H. L. (E.)*
1922
Nov. 28.

Shipping — Charterparty — Construction — Demurrage — Exceptions — General Words followed by specific Words—Ejusdem generis rule—Causes beyond Control of Charterers—Strike.

A charterparty, by which a ship was chartered for a voyage from the East to Rotterdam, stipulated that the cargo should be loaded and discharged in a fixed number of weather working days reversible and provided for demurrage, and it contained the following exception clause: "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count." On the arrival of the ship at Rotterdam her discharge was delayed beyond the stipulated time by a general strike of dock labourers at the port, and it was found as a fact that the strike was a cause over which the charterers had no control:—

Held (by Viscount Cave L.C., Viscount Finlay, and Lord Atkinson; Lord Sumner dissenting), that the initial general words of the exception clause were not controlled by the subsequent specific words, and that the charterers were protected by the clause from liability for demurrage.

Decision of the Court of Appeal [1922] 2 K. B. 185 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of McCardie J., which affirmed an award of an umpire stated in the form of a special case.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD ATKINSON, and LORD SUMNER.

(1) [1922] 2 K. B. 185.

H. L. (E.) 1922 — AMBATIELOS v. ANTON JURGENS MARGARINE WORKS.

The appellant was the owner and the respondents were the charterers of the steamships *Ambatielos* and *Panagis*. By a charterparty dated August 14, 1919, the *Ambatielos* was chartered by the respondents for a voyage from Java to Amsterdam or Rotterdam, and by a charterparty dated November 5, 1919, the *Panagis* was chartered by the respondents for a voyage from Macassar to Amsterdam or Rotterdam.

The question in dispute was as to the liability of the respondents for demurrage and damages for detention under these two charterparties.

The charterparty of the *Ambatielos* provided that the cargo should be loaded and discharged in fourteen weather working days reversible. The charterparty of the *Panagis* provided that the cargo should be loaded and discharged in twenty weather working days reversible.

Both charterparties further provided as follows :—

" Time at loading and/or discharging Port to count twenty-four hours after Steamer's arrival at or off the Port whether in berth or not or in harbour or roads or as near the Port as the Authorities will allow notwithstanding any custom of the Port or Law of the Country or anything contrary in this Charter.

" Should the vessel be detained by causes over which the Charterers have no control, viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count."

The charterparty of the *Ambatielos* allowed twenty days on demurrage at 500*l.* per day : that of the *Panagis* allowed twenty days on demurrage at 350*l.* per day.

The owners also agreed to pay despatch money, in the case of the *Ambatielos* at the rate of 200*l.* per day, and in the case of the *Panagis* at the rate of 150*l.* per day, for every day saved by the charterparty.

The *Ambatielos* arrived at Rotterdam at 11.50 A.M. on March 12, 1920, the lay days expired on March 24, 1920, at 6 A.M., and the discharge was not completed until 6 P.M.

on May 3, 1920. She was therefore detained for forty and a half days beyond the lay days allowed by the charterparty.

The *Panagis* arrived at Rotterdam at noon on February 19, 1920, her lay days expired at noon on March 5, 1920, and the discharge was not completed until 6 P.M. on April 20, 1920. She was therefore detained for forty-six days six hours beyond the lay days allowed by the charterparty.

The umpire found as a fact that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from February 14 to April 28, 1920. He further found as a fact that the strike was a cause over which the respondents had no control, and that but for the strike the steamships could and would have been discharged within their lay days.

The appellant claimed in respect of each steamer demurrage at the charterparty rate for the first twenty days and damages for detention for the balance of the time used, and contended that upon the true construction of the charterparties the respondents were not protected by any exception of strikes.

The respondents resisted this claim upon the ground that upon the true construction of the charterparties they were protected against liability for detention caused by strikes as being a cause beyond their control within the meaning of the exception clause.

Subject to the opinion of the Court, the umpire held that the appellant was entitled to demurrage and damages for detention in respect of both ships, and made an award in his favour of 43,450*l.*

The question for the opinion of the Court was whether upon the true construction of the charterparties and upon the facts found in the case the charterers were protected against liability for the detention of the steamships caused by the strike.

McCardie J. affirmed the award on the grounds that the parties had by the words "viz., quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, etc.," defined the meaning of the words "causes over which the charterers have no control"; that the definition

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limited the protection given to the charterers to the specific causes enumerated; and that the word "etc." was either too vague to afford the charterers any further protection or at most extended the protection only to causes of the same kind as the specific causes enumerated.

The Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.) reversed the decision of the learned judge upon the ground that the general words of the clause were in no way limited by any of the succeeding expressions.

1922. Nov. 27, 28. *Dunlop K.C.* and *S. L. Porter* for the appellant. The question is whether upon the construction of these charterparties the charterers are relieved from paying demurrage by reason of a strike at the port of discharge. The dominant purpose of these charters is that the discharge shall be completed within a fixed time. If the charterers exceed the fixed time they are to pay demurrage and conversely if they complete the discharge in less than the fixed time they are to be entitled to despatch money. The exception clause is to be construed as subordinate to that dominant purpose: *Love and Stewart* v. *Rowtor S.S. Co.* (1); *Glynn* v. *Margetson & Co.* (2) If this clause is to be construed as including every cause beyond the control of the charterers the effect is to turn a fixed time charter into a reasonable time charter. There being thus two inconsistent clauses in the charter, either the exception clause must be ignored or it must receive a more restricted construction: *Thorman* v. *Dowgate S.S. Co.* (3) As it stands the clause is so ambiguous that it is doubtful whether the House can give any effect to it: *Nelson Line* (*Liverpool*), *Ld.* v. *James Nelson & Sons* (4); and see *Rosin and Turpentine Import Co.* v. *B. Jacobs & Sons.* (5) In any case the exception clause must be construed most strongly against those in whose favour it is made: *Burton* v. *English.* (6) Looking at the language of this clause, "videlicet," which means "that is to say,"

(1) [1916] 2 A. C. 527, 535.
(2) [1893] A. C. 351, 355.
(3) [1910] 1 K. B. 410, 416–7.
(4) [1908] A. C. 16, 19.
(5) (1909) 14 Com. Cas. 78, 247; (1910) 15 Com. Cas. 111.
(6) (1883) 12 Q. B. D. 218, 220, 222.

is introduced as a word of limitation in regard to the meaning to be placed upon "causes over which the charterers have no control" and confines those words to the specific causes thereafter enumerated. "Etc." in this connection is too vague a word to widen the protection given by the preceding words, or, if any meaning is to be attached to it, it is subject to the ejusdem generis rule. It is not apt to include such a well-known cause of delay as a strike, but relates to things like the things previously enumerated: *Herman* v. *Morris*. (1) Otherwise "videlicet" has no effect at all. If it is intended to define the causes beyond the control of the charterers by the word "videlicet" it is absurd to construe "etc." as meaning all other causes beyond their control. Strikes, at a time when labour unrest was rife after the war, must have been in the minds of the parties at the date of the contract, and the fair inference is that the omission of strikes from the exception clause was intentional. If it was intended to include strikes this should have been stated in plain and unambiguous language: *Elderslie S.S. Co.* v. *Borthwick* (2); *Northfield S.S. Co.* v. *Compagnie L'Union des Gaz*. (3) Prima facie when general words are immediately associated with specific words the doctrine of ejusdem generis is applied, and it makes no difference whether the general words precede or follow the specific words. This doctrine has been applied to charterparties in a long series of cases. In *Thames and Mersey Insurance Co.* v. *Hamilton, Fraser & Co.* (4) Lord Macnaghten, in expounding the ejusdem generis rule, says that the test to be applied is whether the things to which the general words refer are "like" or "akin to" the things specifically described, and doubts whether it is necessary to find a common characteristic running through the specific words—at any rate where several distinct cases are enumerated leading to a common result or intended to be met by a common remedy; and he reaffirms that principle in *S.S. Knutsford* v. *Tillmanns & Co.* (5) Assuming that a common genus is

(1) (1919) 35 Times L. R. 574.
(2) [1905] A. C. 93.
(3) [1912] 1 K. B. 434, 441.
(4) (1887) 12 App. Cas. 484, 501–2.
(5) [1908] A. C. 406, 408; affirming [1908] 2 K. B. 385, 405.

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necessary, it is at least a genus which is very loosely defined: *Aktieselskabet Frank* v. *Namaqua Copper Co.* (1); and see Scrutton on Charterparties, 10th ed., p. 237. Upon any view of the case strikes are not of the same class as the specified exceptions.

[They also referred to *Stukeley* v. *Butler*. (2)]

Sir John Simon K.C. (with him *Jowitt K.C.*) for the respondents. The special features of this case are (1.) that the general words come first and (2.) that the words which follow, while introduced by a "viz.," are ended by "etc." As a matter of good sense there is no justification for cutting down the general words. The special words are given as illustrations and the use of "etc." shows that those illustrations are not intended to be exhaustive. There is no authority for saying that the ejusdem generis rule applies where the general words precede the specific words. Indeed the terms in which the rule has been defined by eminent judges point to the opposite conclusion. In *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (3) Lord Macnaghten states the rule as to the effect of general words to be that they "must be interpreted by reference to the words which immediately precede them." In *Herman* v. *Morris* (4) Scrutton L.J. defined the rule thus: "that, in a specific clause followed by general words, the general words were to be taken as being intended to apply only to those persons and things which were ejusdem generis with those comprehended in the specific clause," and his statement of the rule at p. 236 of his book on charterparties is to the same effect. Nor is there any authority for the proposition that the Latin words "et cætera" are to be subject to the ejusdem generis rule. It is said, first, that in this clause there are five named causes and no others which will excuse delay, inasmuch as "etc." has no effect, but upon that construction the general words are wholly superfluous. Alternatively it is said that the ejusdem generis rule applies, but, apart from the objections already mentioned, there is no homogeneity in the enumerated

(1) (1920) 25 Com. Cas. 212, 219.
(2) (1615) Hobart, 168.
(3) 12 App. Cas. 484, 501.
(4) 35 Times L. R. 574, 576.

causes beyond being causes over which the charterers have no control. It is not contended that every strike would afford the charterers relief, but here the arbitrator has found as a fact that this particular strike was beyond the charterers' control. The exception clause is not ambiguous.

S. L. Porter in reply referred to *Gover* v. *Davis*. (1)

VISCOUNT CAVE L.C. My Lords, this case has been fully and ably argued, but upon the whole I have come to the conclusion that the decision of the Court of Appeal was right.

The case turns upon the meaning of a particular clause which is contained in each of two charterparties. By each of these charterparties the respondents chartered from the appellant a vessel to carry cargo, to put it shortly, from the East to Rotterdam. Each charterparty stipulated that the cargo should be loaded and discharged in a fixed number of weather working days reversible, and provided for demurrage, and each document contained this clause, upon which the whole matter turns : " Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count."

Now the discharge of each vessel was delayed by a general strike of dock labourers at Rotterdam. The matter was referred to arbitration, and the finding of the arbitrator upon that point is this : " I find as a fact that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from 14th February to the 28th April, 1920. I further find as a fact that the said strike was a cause over which the charterers had no control and that but for the said strike the said steamships could and would have been discharged within their lay days." On that the question arose whether the charterers were liable for demurrage and damages for detention, which in this case would have amounted to a very large sum of money exceeding 40,000*l*., or whether they were excused by the

(1) (1860) 29 Beav. 222.

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clause which I have read. The arbitrator decided against the charterers and stated a case for the opinion of the Court. McCardie J. agreed with the arbitrator, but his decision was reversed by the Court of Appeal, which gave judgment for the charterers. Hence the present appeal.

My Lords, it is desirable first to look at the frame of the clause in question. It begins by a general hypothesis or condition: "Should the vessel be detained by causes over which the charterers have no control." There is no question that, if the condition had stopped there, this case would fall within it; for it is found that the general strike which detained the vessel in each case was something over which the charterers had no control. But those words are followed by the other words which I have cited beginning with "viz." and ending with "etc."; and the question is whether that addition is sufficient to cut down and limit the effect of the preceding general words and to confine the operation of the clause to the particular cases stated in the added words and cases of a similar kind—in other words, whether the added words are defining and limiting words, or are simply added in order to provide examples of what is meant by the general words, but not to cut them down.

Now, my Lords, I find myself very much in agreement with what was said by the learned Master of the Rolls, and was repeated in the argument of Sir John Simon here to-day. It is not right first to consider the effect of the word "viz." by itself, and then to consider whether that effect is altered by the later occurrence of the expression "etc." You must consider the two together; and, if you do that, I think the effect of what I have called the added words is this, that the draftsman shows an intention, first, of giving examples of what the general words mean and cover, and, secondly (and this is equally important), of showing to those who read the clause, by the use of the word "etc.," that those examples are not intended to cover the whole ground, that they are not intended to be exhaustive, but, that the general principle is still to include all the other cases which fall within its general terms. In other words, the clause must be read as referring

to all causes over which the charterers have no control, in particular to the five causes specified, but also to all other cases which fall within the general words. That is the meaning which for myself I should give to the clause.

My Lords, certain arguments were put forward very forcibly on behalf of the appellant. First it was said that the dominant purpose of the charter is that there shall be no delay and that the vessel shall be loaded and unloaded within the time specified, and that you must not so read this clause of exception as to hamper or defeat that dominant purpose. I cannot agree with that. The very object of the exception is to limit and cut down the earlier provisions of the charter, and all one has to see is whether, in fact, they have that effect.

Then it is said that the added words, as I have called them, are not explanatory but limiting words, and that they cut down the operation of the clause to the five cases specified and other cases of a similar kind, and reference is made to the well-known ejusdem generis rule. My Lords, I know of no authority for applying that rule to a case of this kind, a case where, to begin with, the whole clause is governed by the initial general words, where, secondly, the expression to be so construed is the expression "etc.," and where, thirdly, there is no genus which comprises all the five cases specified other than the genus described in the general words. With great respect to the learned judge who heard the case, I cannot think that he was successful in finding such a genus. I therefore come back to the general proposition, and I am of opinion that the exception applies in all cases where the vessel is detained by causes over which the charterers have no control, and, accordingly, that it applies to the present case.

A number of authorities have been cited. Perhaps the most instructive of them is the old case in Hobart where some valuable observations are to be found. But there is no case in the whole list which is anything like this case, or which can be said to govern this case; and, therefore, I do not think it necessary to refer to them in detail.

My Lords, for these reasons I think that this appeal fails, and I move your Lordships that it be dismissed with costs.

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VISCOUNT FINLAY. My Lords, I am also of opinion that this appeal fails.

The facts are very concisely stated, and all that is material for the present purpose is on p. 5 of the appendix where the award is set out. The seventh paragraph finds "that the sole cause of the detention of each steamer as aforesaid was a general strike of dock labourers at Rotterdam which prevailed from the 14th February to the 28th April, 1920. I further find as a fact that the said strike was a cause over which the charterers had no control, and that but for the said strike the said steamships could and would have been discharged within their lay days"; and then in the eighth paragraph the umpire further says this: "He further claimed" (that is, the owner claimed) "that notwithstanding the strike the charterers could by reasonable diligence have discharged the steamers earlier, but on this issue, which is an issue of fact, I find in favour of the charterers." So that you have got this found on the award, that the strike was a matter over which the charterers had no control, and that the delay which took place was entirely unavoidable and due to the strike. There might, of course, be circumstances, although there were a strike, under which it would not necessarily entail delay in the loading. Labour might be got from the crew itself, or elsewhere, or some not very extravagant payment might have induced the men who were on strike themselves to return to work. We are not concerned with any such case as that, because it is quite clear, on the findings of the umpire in the present case, that it was perfectly unavoidable, and that nothing the charterers could do would have avoided the consequences.

Now we come to consider whether, under these circumstances, demurrage is payable. The amount is very considerable, but the determination of this large amount of money depends on the construction to be put upon a very few lines in the charterparty. On p. 8 of the appendix there will be found just below letter C the provision: "Cargo to be loaded and discharged in 20 weather working days reversible." Now something has been said about the history of this charter.

This charter was in a form which was in print. It was a great deal altered, words in print were struck out and words in writing were inserted; and it was said, in tracing the history of these alterations, that it made it improbable that the construction for which the respondents contend should be the true one. I think that all we have to do with is the charter as it finally stands; we must construe the clause with which we have to deal according to the form which the charter ultimately assumed. All the particulars we have had may be very interesting as matter of history; I do not think they really affect the construction which ought to be put upon the charter now that we have got it.

After that clause, which makes it clear that twenty weather working days are to be allowed for discharging, we have, further down on the same p. 8, the clause on which the dispute arises: "Should the vessel be detained by causes over which the charterers have no control, viz., quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, etc., no demurrage is to be charged and lay days not to count." To my mind the frame of that clause is this. The initial lines lay down the general principle and state the ground of exemption, that is, if the detention arises from causes over which the charterers have no control; in that case no demurrage is to be charged and the lay days are not to count. But then, after the initial words to which I have referred as laying down the general principle, you have got this: "viz., quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, etc.," and it is said that these words show that you cannot deal with it merely on the general principle, but that the operation of the general principle, which was contained in the initial lines, taken by itself is controlled by the particulars which follow; so that the result will not be attained unless the particular cause (which here was a strike) can be found in the particulars enumerated, or is, in some way not very clearly defined, characterized by some feature in common with the things which are named.

Now the only common feature that I can find here is that

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all these things are things which may detain the vessel and constitute causes over which the charterers have no control. I do not think that the attempt made by the learned judge, McCardie J., to establish common features apart from that general principle is successful. I refer to the passage in his judgment which begins on p. 20 of the appendix between G and H: "Now, applying that test to these words it is, I think, reasonably plain that there is a common or dominant feature. Quarantine is an act of local authority; ice is a force of nature; hurricane is a force of nature; blockade is an act of authority; and the clearing of the steamer is obviously, I think, an act of the local authority in respect to points of clearance. Therefore you do get a dominant feature in the sense of overriding powers, whether by nature or local authority, whereas a strike, in its essence, is really and substantially different, because there is no question of authority imposed upon the ship, the shipowner, or the charterers. There is simply a voluntary abstention from work by a number of men which happens to interfere with the loading, or causes a cessation so far as the work of loading is concerned. In its essence the thing is different from the exertion of a local authority's powers, and, therefore, I think that, applying, if it can be applied here, the *ejusdem generis* rule, a strike would not fall within the genus or species, or whatever it may be, which is indicated by the preceding words." I am not able to assent to the reasoning in that passage, or to the conclusion which the learned judge draws from what he says. It appears to me that *the* common feature which these various things enumerated have, is that they constitute causes beyond the control of the charterer, and that these cause detention of the vessel. That seems to me the real substantial feature in common, and, if there is a class, it is the class of things which will have this effect upon the vessel of detaining it without the charterers being in fault. I confess I am quite unable to appreciate any theory based on the view that a hurricane is due to a law of nature, quarantine to the law of a local authority, or the clearing of a steamer to the local law of the port about clearing. I do

not think that is the true way of looking at it at all. It seems to me that *the* common feature is the detention of the vessel without fault on the part of the charterers.

Now looking again, and looking more narrowly, at the words which follow those stating the general and governing principle, as I think, they are these: "viz., quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, etc." Now I so far go with the appellant in his argument that I think that the word "videlicet," in the correct sense of the word, does not denote —is not equivalent to—"for instance" or "for example." I think that "videlicet" really is correctly rendered in English by "to wit" or "that is to say"; that is the force of the word standing by itself. But that "videlicet" does not stand by itself here; although these interposed lines begin with "viz." they end with the phrase "etc.," and it appears to me that the effect of these interposed lines taken as a whole is to provide that, if there is any cause beyond the control of the charterers which occasions delay, the charterers are not to be liable. One, of course, cannot treat the charterparty as a work to which literary style is essential, and it is, of course, obvious to say: "Why do they go and set to work in such a circuitous way? They begin by stating very clearly a general principle, and then they propose to make their meaning clear by giving particular cases, they put them in and then (if one may conjecture) they think 'But after all there may be other cases, and so we put in etc.'" Well, what are the other cases? "Etc." is absolutely different from "et alia"—that subject was discussed in McCardie J.'s judgment—it means "all the rest." All the rest of what? I regard it here as being all other cases in which detention is caused by causes which are beyond the control of the charterers. On the finding of the umpire this strike was entirely beyond the control of the charterers, and the results could not have been avoided by them. Therefore it appears to me that this appeal fails.

LORD ATKINSON. My Lords, I concur. I entirely agree

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with the construction that has been put upon the clause in dispute here by my two noble and learned friends who have preceded me, and I do not think it necessary to add anything further.

LORD SUMNER. My Lords, to my unfeigned sorrow I find myself unable to agree with the opinions which your Lordships have just expressed and with the judgment of the Court of Appeal.

The general framework of this charterparty affords but little assistance in construing the particular clause before us, nor is anything to be gained by pointing out in detail that it is an unusually inartificial document. It is true that, as originally printed, it provided at the port of discharge for despatch in accordance with the custom of the port, that is reasonable despatch under the circumstances, instead of fixed lay days, and that it has been converted by drastic alterations into a charterparty with fixed lay days even at the port of discharge, but that does not put it beyond the power of the parties, if they have in fact done so, to provide a clause of exceptions by which, if the number of lay days is exceeded by the charterers through causes over which they have no control, they may be excused from liability in that event. What is important, however, is that in this case the charterers clearly failed to discharge within the fixed time. They therefore are in default and must pay, unless they can find words in the charterparty which exempt them from their liability to pay. They point to the words which your Lordships have read.

It is also quite clear that, as this is a clause inserted for the benefit of the charterer and to the prejudice of the shipowner, it is incumbent upon the charterer to express it in words that will relieve him with such reasonable clearness as to enable the shipowner to know where he stands. If the charterer speaks with two voices, it is not for him to say that, because one part of his clause achieves his object, the conflict produced by the other part of the clause is of no materiality. The principle laid down by your Lordships in the case of

Elderslie Steamship Co. v. *Borthwick* (1) has now completely settled that.

Another thing, I think, may be pointed out. It is that this charter is so drafted that, although it is a business document, one need not be surprised if the parties have in the result contrived to say a good deal to which no meaning is to be attached at all. Redundancy is a feature of this charter-party. In this very clause, for example, the words "and lay days not to count" are in any view of the matter unnecessary; for all that the clause seeks to effect is to provide that no demurrage is to be charged, whether it be fixed demurrage or general damages for detention, and to say that the lay days are not to count is to contradict the earlier clauses, which have already said what the lay days are to be and what days are to count as lay days. I therefore am not much impressed by the comment, which undoubtedly arises, that, upon the construction, which I think is the right one, several words in this particular clause might just as well not have been there; that in fact it would have been very much better if they had not been there, and then no more need we have been here either.

Take the words, my Lords, just as they stand. Translate the two Latin abbreviations into English, and they run thus: "Should the vessel be detained" (that is to say beyond the lay days already provided) "by causes over which the charterers have no control," (that is to say, quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over, and the rest), "no demurrage is to be charged." What does that mean? I accept that one must not take one word in isolation from the other words which accompany it and, having determined its isolated meaning, refuse to be influenced by the meaning of the words in the company of which it is found. With very great respect, I cannot see how that really alters the construction. I think "viz." means "that is to say." Whether you take it by itself, or whether you follow it at a respectful distance by the word "etc.," it still means "that is to say." I admit at once

(1) [1905] A. C. 93, 96.

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that if it meant "exempli gratia" there would be an end of this matter and the appeal would fail; but the words are "viz." ("that is to say"), certain things which are specified, "and the rest," which are not specified. The rest of what? This we are not told.

I do not think there is any question here of what is called the ejusdem generis rule, and I will not pursue that subject. The words are not "et alia"; they are "etc." The word "viz." introduces a couple of lines of print, which consist as to one part of specified matters and as to the other part of an omnibus reference to residuary things, the totality of which is unknown to us and was not expressed by the person, whose business it was to explain its meaning—namely, the charterer. When you say "that is to say," following upon some general words, I think you inevitably limit and define the words that you have previously used. It is not merely an illustration, it is an explanation; it is the precise statement of what is meant by the general words, with which the sentence begins. Thus the causes over which the charterers have no control with which this clause is conversant are simply "quarantine, ice, hurricane, blockade, clearing of the steamer after the last cargo is taken over" (whatever that may mean), "etc.," whatever that again may mean.

If you have once concluded that these specific matters are substituted for the general phrase "should the vessel be detained by causes over which the charterers have no control," I do not think that the word "etc." undoes that effect and prevents "viz." from having a defining and limiting effect, nor is it so far self-explanatory as to add to these enumerated and specially named things such an exception as strikes. The notion of strikes may be there or it may not, but it was for the charterer to clear the matter up, and, as he has not chosen to do so, I do not think he can claim to have exempted himself from the liability which, in the absence of exemption, undoubtedly rests upon him.

My Lords, the point is an extremely narrow one; it may seem paradoxical that between 40,000*l.* and 50,000*l.* should depend upon two Latin abbreviations, "viz." and "etc.,"

but I do not find this consideration either daunts or helps me.

My Lords, I think the appeal ought to succeed upon this short ground.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 28, 1922.

Solicitors for the appellant: *Holman, Fenwick & Willan.*
Solicitors for the respondents: *Slaughter & May.*

[HOUSE OF LORDS.]

COMMONWEALTH SHIPPING REPRESENTATIVE . . . . . } APPELLANT;

AND

PENINSULAR AND ORIENTAL BRANCH SERVICE . . . . . } RESPONDENTS.

H. L. (E.)* 1922 Dec. 14.

Shipping—Charterparty T. 99—Collision—War or Marine Risk—"Consequence of warlike operation"—Transport of War Material from One War Base to Another—Evidence—Judicial Notice.

Prima facie the transport by sea of war material in time of war from one war base to another war base is a warlike operation within the meaning of the usual f. c. and s. warranty in a marine policy.

Though the Court may take judicial notice of the existence of a state of war between this country and another, it may not take judicial notice of the date of any particular military movement in the course of the war.

On January 1, 1916, a collision occurred after dark in the Mediterranean between the s.s. *B.* and the s.s. *G.*, which resulted in the loss of the *G.* Both ships were sailing at full speed and without lights in accordance with Admiralty regulations, and no blame attached to either. The *G.* was requisitioned by the Government of the Commonwealth of Australia upon the terms of a charterparty which provided that the Government should accept war risks but not ordinary marine risks. The question whether the loss was due to a war risk was referred to an

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SUMNER.

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arbitrator, who found that at the time of the collision the *G.* was carrying a general cargo, and that the *B.* "was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)":—

Held, on the latter finding, that the *B.* was engaged on a warlike operation, that the loss of the *G.* was a direct consequence of that warlike operation, and that the Commonwealth Government were liable under the charterparty.

Decision of the Court of Appeal [1922] 1 K. B. 706 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bailhache J. upon an award of an arbitrator stated in the form of a special case.

The following statement of facts is taken from the opinion of the Lord Chancellor :—

"The respondents were the owners of a steamship called the *Geelong* which, in the year 1915, was requisitioned by the Government of the Commonwealth of Australia for transport purposes in connection with the War. The requisition was made upon the terms of the well-known form of charter known as T. 99, which included a provision that the Commonwealth Government should accept full war risks—an expression which was understood and agreed by all parties to make the Government responsible for such risks of war as would be excluded from an ordinary marine policy by the usual f. c. and s. warranty, including in that warranty all consequences of hostilities or warlike operations.

"On the 1st January, 1916, the *Geelong*, which was not at the moment required for the transport of war material, was carrying a general cargo on Government account, and was bound from Port Said to Gibraltar for orders; and at about half-past seven in the evening of that day, when she was a few miles off Alexandria and was sailing (in accordance with the Admiralty instructions) at best speed without showing any lights, she was run into by another steamship called the *Bonvilston*, which was also sailing at full speed without lights, and was sunk. The *Bonvilston* was under requisition by the British Government, and at the time of the collision was

(1) [1922] 1 K. B. 706.

carrying ambulance wagons and other Government stores from Mudros to Alexandria. There was no negligence on the part of either vessel.

"The respondents having made a claim against the appellant on the ground that the loss of the vessel was due to a war risk, and their claim being disputed, the matter was referred to the arbitration of Mr. Raeburn K.C., who made his award in the form of a special case for the opinion of the Court. By that case he found the above facts, his findings as to the purpose for which the *Bonvilston* was being used at the time of the collision being in the following terms: 'The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the Naval Authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights.'"

The arbitrator, in so far as it was a question of fact, found, and, in so far as it was a question of law (and in such case subject to the opinion of the Court) held, that the loss of the *Geelong* was caused by a marine and not a war peril, and the question stated by him for the opinion of the Court was whether he was right in so holding. He accordingly awarded, subject to the opinion of the Court, that the present appellant, the Commonwealth Shipping Representative, was under no liability to the owners of the *Geelong*, the present respondents.

Bailhache J. on the contrary held that the loss was due to a war peril, and his judgment was affirmed by the Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.).

1922. Nov. 17. *R. A. Wright K.C.* (with him *H. Claughton Scott*) for the appellant. Prima facie the loss was due to a marine peril. It is for the respondents to prove that it was the consequence of a warlike operation. Their case fails

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for want of evidence and there is no material upon which the Court can say that the arbitrator was wrong. Sailing without lights in compliance with Admiralty regulations is not a warlike operation. The *Bonvilston* at the time of the collision was navigating the sea like any other vessel, and the fact that she was carrying ambulance wagons was accidental. To convert that into a warlike operation it must be proved affirmatively that the goods were being transported "for combative purposes": per Lord Atkinson in *Britain Steamship Co.* v. *The King.* (1) The finding of the arbitrator that the goods were being carried from one war base to another is not of itself sufficient to prove that they were intended to be used for combative purposes. That was the view of two of the three members of the Court of Appeal, but the Court took judicial notice of the date of the evacuation of the troops from Gallipoli, which occurred about the time of the collision, and inferred from that fact that the *Bonvilston* was carrying these goods for purposes connected with the evacuation. That is carrying the doctrine of judicial notice to an unheard-of length. In fact the Court was usurping the province of the arbitrator and was adding to his findings facts which he neither found nor was entitled to find.

[He also referred to *Attorney-General* v. *Ard Coasters, Ld.* (2) and *British and Foreign Steamship Co.* v. *The King.* (3)]

Sir John Simon K.C. and *MacKinnon K.C.* (with them *G. P. Langton*) for the respondents.

The question turns upon the effect of the finding of the arbitrator that the *Bonvilston* at the time of the collision was employed by the British Government in carrying ambulance wagons from one war base to another. A war base is a place selected in immediate connection with, and in the immediate rear of, military and naval operations in a particular theatre of war, in which to concentrate supplies and troops for carrying on the fighting in that theatre, and in these respects

(1) [1921] 1 A. C. 99, 114.
(2) [1921] 2 A. C. 141.
(3) [1917] 2 K. B. 769; [1918] 2 K. B. 879.

differs from what is known as a base of supply: see *The Kim.* (1) If the *Bonvilston* had been carrying combative troops from one war base to another this case would clearly come within the consequences of warlike operations. In *Britain Steamship Co.* v. *The King* (2) Lord Atkinson in discussing the *St. Oswald's Case* (*British and Foreign Steamship Co.* v. *The King* (3)) says that the ship was, at the time of her loss, employed "on a service which was in its own nature a 'warlike operation'—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination." It has also been held by the Court of Appeal since the decision of that Court in the present case that a ship carrying wounded soldiers is engaged in a warlike operation: *Adelaide Steamship Co.* v. *The King.* (4) Suppose two vessels, one carrying men and the other horses, would that make any difference? Then suppose that instead of horses the vessel was carrying guns, or field kitchens, or ambulance wagons. There is no difference, for this purpose, between the carriage of troops and the carriage of other things, animate or inanimate, which are part and parcel of the war outfit. If the Court of Appeal were right in taking judicial notice of the date of the evacuation of Gallipoli, as to which see Taylor on Evidence, §§ 16, 17, 18; Wills on Evidence, 1st ed., pp. 16–20, that strengthens the respondents' case, but evacuation was not essential to Lord Atkinson's opinion in the passage above quoted. It is therefore not necessary to be precise as to dates. The respondents are entitled to succeed without praying in aid the fact that the date of the collision was within a day or two of the actual evacuation. It is enough to say that the movement of troops or war equipment in time of war from one war base to another is, in the absence of evidence to the contrary, a warlike operation; and, if that is so, the loss of the *Geelong* was directly due to that operation.

R. A. Wright K.C. replied.

(1) [1915] P. 215, 271.
(2) [1921] 1 A. C. 99, 116.
(3) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(4) (1922) 38 Times L. R. 864; since reported [1923] 1 K. B. 59.

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The House took time for consideration.

1922. Dec. 14. VISCOUNT CAVE L.C. My Lords, this appeal raises once more a question which has already been several times debated in this House—namely, the question of the meaning to be given to the expression "all consequences of hostilities or warlike operations" when contained in a policy of marine insurance. [His Lordship stated the facts and continued.]

Upon the above facts the arbitrator found that the loss of the *Geelong* was caused by a marine peril and not by a war peril, but submitted the question whether he was right in law in so doing, for the opinion of the Court. The case was argued before Bailhache J., who held that the *Bonvilston*, being engaged in carrying ambulance wagons and other Government stores from one war base to another war base, was engaged in a warlike operation, and accordingly gave judgment for the respondents. Upon the matter being taken to the Court of Appeal, that Court (consisting of the Master of the Rolls and Warrington and Scrutton L.JJ.) unanimously affirmed the decision of the learned judge, but upon somewhat varying grounds. Warrington L.J., while declining to express a definite opinion as to whether upon the facts found by the arbitrator he would have come to the same conclusion as Bailhache J., held that the Court was entitled to take notice of the historical fact that Mudros was the advance base for the British operations in the Gallipoli Peninsula, and that the collision happened in the middle of the operations connected with the evacuation of the Peninsula; and from these facts he inferred that the *Bonvilston* was at the time of the collision carrying warlike equipment from Mudros in connection with the evacuation, and for that reason was engaged in a warlike operation. On the other hand Scrutton L.J., while holding that the Court was at liberty to take from the *St. Oswald Case* (*British and Foreign Steamship Co.* v. *The King* (1)) the fact that Gallipoli was being evacuated on December 31 and January 1 and to conclude

(1) [1918] 2 K. B. 879.

that the voyage of the *Bonvilston* from Mudros to Egypt on January 1 was part of that warlike operation, was prepared, apart from that circumstance, to hold that carrying ambulance wagons and Government stores from one war base to another in time of war, was a warlike operation. The Master of the Rolls, while he would have preferred to have from the arbitrator a more complete finding as to what the *Bonvilston* was doing at the time of the collision, did not dissent from the opinions of his colleagues. Thereupon the present appeal was brought.

My Lords, I am inclined to think that, in taking notice of the dates of the evacuation of Suvla Bay and Helles in the Gallipoli Peninsula, and in inferring from those dates (without any finding by the arbitrator) that the *Bonvilston* was taking part in that evacuation, the Court of Appeal carried too far the doctrine of judicial notice. There is no doubt that judicial notice may be taken of the existence of a state of war between this country and another: see per Lord Eldon in *Dolder* v. *Lord Huntingfield* (1), and per Lord Ellenborough in *Rex* v. *De Berenger* (2); and it was said in *Taylor* v. *Barclay* (3) that "it is the duty of the Judge in every Court to take notice of public matters which affect the Government of the country." Further, where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to: per Lord Halsbury in *Read* v. *Bishop of Lincoln.* (4) But I know of no authority for the proposition that the date of a particular event in a modern war, such as an engagement or a withdrawal, however important in itself, may be stated without proof, and an inference based upon it; and in any case I do not understand how such an inference can be drawn for the first time in a Court of Appeal, when the opportunity of rebutting the inference has passed by.

I, therefore, put on one side this element in the decision of the Court of Appeal, and proceed to consider the effect of the findings in the award; and first it is necessary to determine

(1) (1805) 11 Ves. 283, 292.
(2) (1814) 3 M. & S. 67, 69.
(3) (1828) 2 Sim. 213, 220.
(4) [1892] A. C. 644, 653.

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what those findings mean. Your Lordships were invited by counsel for the appellant to proceed on the footing that the ambulance wagons and other Government stores referred to in the award were being transported by the *Bonvilston* for some perfectly peaceful purpose, that they may never have been landed at Mudros at all, and that they may have been intended for use in connection with some civil hospital at Alexandria, or for some other non-combatant purpose. It appears to me that any such assumption would do less than justice to the language of the award. When the arbitrator found that the *Bonvilston* was under requisition by the British Government, and was "carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)," he must assuredly have intended the Court to understand that the cargo consisted of war material of the above character which was being transported from one war base—that is to say, from a point behind a fighting front from which the forces engaged on that front might be fed with men, munitions and supplies—to another war base for war purposes. At all events I so read the finding, and am satisfied that, if anything else had been intended, very different language would have been used. This, then, was the duty in which the *Bonvilston* was engaged at the time of the collision; and the question to be determined is whether this was a warlike operation within the meaning of the warranty.

My Lords, I do not propose to attempt to define the expression "warlike operations." It is composed of ordinary English words in common use, and to define them by other like words might only produce a call for further definition. But it is possible to go some way in considering what is or is not included in the expression. Plainly it does not include all operations in war, or even all operations for the purposes of war. For instance, the *Petersham*, which was carrying iron ore to be used in the manufacture of munitions, and the *Matiana*, which was carrying cotton which might well have been intended to be used for the clothing of troops, were held by all the members of your Lordships' House who heard the appeals in those cases not to be engaged in warlike

operations: *Britain Steamship Co.* v. *The King.* (1) On the other hand, the expression is not confined to actual combatant operations against the enemy, whether by way of attack or of defence; for in the case of the *Richard de Larrinaga* (*Liverpool and London War Risks Insurance Association* v. *Marine Underwriters of S.S. Richard de Larrinaga* (2)) a warship on her way to pick up a convoy was held by this House to be engaged in a warlike operation. Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase "warlike operations." Probably the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war. Thus, as was said by Lord Atkinson in the *Petersham Case*, the transfer of the combative forces of a belligerent Power from one area of war to another for combative purposes would be a warlike operation; and the same may, I think, be said of the transport in like manner of guns or munitions of war. Nor, in my opinion, can any valid distinction be drawn in this respect between munitions of war and the materials for equipping a fighting force, such as saddles for the cavalry, field kitchens for the infantry, or ambulance wagons for the wounded in battle. All these things are an essential part of the equipment of an army in the field, and to transport them to an area of war is a part of the warlike operations conducted in that area not less essential than the provision of men, guns, rifles, or ammunition.

If this be—as I think it is—the true meaning of the expression to be construed, then the finding of the arbitrator in this case (interpreted as I have interpreted it) contains ample material on which to support the decisions of Bailhache J. and the Court of Appeal. The *Bonvilston* was a vessel in the service of the British Government and engaged in the warlike operation of transporting war material from one war base to another, and while so engaged and sailing at full speed without lights, to avoid submarine attack, she without any negligence struck and sank the *Geelong*; and,

(1) [1921] 1 A. C. 99. (2) [1921] 2 A. C. 141.

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if so, it follows, according to the decisions already given in this House, that the loss of the *Geelong* was a direct consequence of a warlike operation, and accordingly that the respondents are entitled to succeed. For these reasons I move your Lordships that this appeal be dismissed with costs.

VISCOUNT FINLAY (read by LORD ATKINSON). My Lords, this case arises upon an award and special case, and the question is whether the loss of the steamship *Geelong* was due to war risks or to ordinary marine risks.

In April, 1915, the *Geelong* was requisitioned by the Commonwealth Government for transport purposes in connection with the war (appendix, p. 2; case, para. 1). The terms of the requisition provided as follows (case, para. 2): "The Commonwealth Government accepts full war risks and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace." For the purposes of this case, however, it was agreed that the effect of this special definition was to make the Commonwealth Government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f. c. and s. warranty, including in such warranty all consequences of hostilities or warlike operations: para. 3. The form of this warranty is not stated in the case, but the parties agreed at the Bar of your Lordships' House that it is as follows: "Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war." It follows that any risk excluded by this warranty will be a war risk for the purposes of this case. It is alleged by the claimants that the risk in the present case would be excluded from an ordinary policy by the words "from all consequences of hostilities or warlike operations."

It is settled by decision that the mere fact that a collision

between merchantmen caused by navigating at full speed at night without lights in obedience to regulations in force during wartime does not by itself make the loss one resulting from a war risk within the meaning of this clause. But if one or both of the vessels were engaged at the time in a warlike operation it becomes a war risk as being a consequence of a warlike operation. The case therefore resolves itself into the inquiry whether either or both of two merchant vessels, the *Geelong* and the *Bonvilston*, were on the facts of this case engaged in a warlike operation.

The facts appearing upon the special case are the following: The *Geelong* was totally lost by a collision between her and the British steamship *Bonvilston* in the East Mediterranean in latitude 32° 46′ N., longitude 30° 5′ E., at 7.27 P.M. on January 1, 1916. There was no negligence on the part of either vessel. The *Geelong* was bound from Port Said to Gibraltar for orders, and was laden with a cargo of general goods. The *Bonvilston* was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from Mudros to Alexandria. Both Mudros and Alexandria were war bases. The Mediterranean at that time was the scene of considerable activity on the part of enemy submarines, and in obedience to the instructions of the naval authorities both vessels were, when the collision took place, being navigated at best speed and without showing any lights. It has not been alleged that the *Geelong* was engaged in a warlike operation. She was proceeding with a cargo of general goods to Gibraltar for orders. The question is, whether the *Bonvilston* was so engaged.

The question was referred to Mr. Raeburn K.C. as arbitrator. Mr. Raeburn in his award and special case, after stating the contentions of the parties (appendix, p. 4; paras. 10 and 11 of the award and special case) finds as follows: "In so far as it is a question of fact, I find, and in so far as it is a question of law (and in such case subject to the opinion of the Court), I hold that the loss of the *Geelong* was caused by a marine peril, and not by a war peril" (award, para. 12).

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The learned arbitrator does not state the grounds on which he arrived at this conclusion. Personally I should have been very glad to have had the help which might have been afforded by a statement from so able and experienced an arbitrator of the path by which he arrived at his conclusion. The award states his conclusion, subject to the opinion of the Court upon the case, and adds in para. 12: "The question for the opinion of the Court is whether I am right in law in holding that the loss of the *Geelong* was in the circumstances hereinbefore stated caused by a marine peril and not by a war peril." The question, therefore, is whether upon the facts stated in the case, the loss of the *Geelong* was as a matter of law a loss by war peril.

Bailhache J. held that the *Bonvilston* was engaged in a warlike operation. He says (1): "Now in my opinion, a vessel engaged as the *Bonvilston* was in carrying Government and British stores and ambulance wagons from one war base to another war base is engaged in a warlike operation." He refers to the opinion expressed by Lord Atkinson (2) in reference to the case of the *St. Oswald* that a vessel engaged in the business of carrying some of the forces of the Crown from Gallipoli upon its evacuation to some other destination was engaged in a warlike operation. Bailhache J. then proceeds: "Now if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to convey munitions of war or ambulance wagons for the use of wounded soldiers from one place to another." And on this ground he answered the questions in the special case in favour of the claimants.

The decision of Bailhache J. was confirmed in the Court of Appeal, but not precisely upon the same ground. The Master of the Rolls, referring to the proposition laid down by Bailhache J., which I have already quoted, says (3): "I am not prepared to assent to such a broad proposition as that. I can quite conceive that a merchant vessel may be carrying

(1) [1922] 1 K. B. 706, 710. (2) [1921] 1 A. C. 116.
(3) [1922] 1 K. B. 714.

ambulance wagons and other Government stores from one war base to another war base and still in certain circumstances may not be engaged in a warlike operation, and I think, if left to myself, I should have said that we have not sufficient findings of fact to determine whether the learned Judge is right in his decision or not." He goes on to say that personally he should have desired further information, but as his colleagues thought this unnecessary he would not dissent from their affirmance of Bailhache J. Warrington L.J. thought the Court was at liberty to take notice of the dates of the evacuation of Gallipoli and of the fact that Mudros was notoriously the advanced base for the operations in Gallipoli, and so to infer that the carriage of wagons and stores by the *Bonvilston* was part of the process of evacuation, and therefore a warlike operation. Scrutton L.J. put his decision on two grounds. In the first place he said (1): "I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation." But he went on to say: "I also think, though, of course, it is not necessary for my decision on the view I take, that we are at liberty to take from the *St. Oswald Case* the fact that Gallipoli was being evacuated on December 31 and January 1, and to conclude that this voyage from Mudros to Egypt on January 1 was part of the warlike operation of the evacuation of Gallipoli. This, of course, if correct, makes the case much stronger." I am not prepared to accept as correct the proposition that we may add to this special case additional facts which happen to have been proved in another case.

The question must be decided simply upon the facts stated in the special case itself. The precise dates and details of particular warlike operations cannot be regarded as matters of which the Court can take judicial notice. If they are material they should be found by the arbitrator. But in my opinion enough is stated in the case itself to enable us to answer the question. Para. 1 states that the *Geelong* was requisitioned by the Commonwealth Government for

(1) [1922] 1 K. B. 718.

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transport purposes in connection with the war, but there is nothing to show that at the time of the collision she was engaged in any warlike operation. She was simply proceeding to Gibraltar for orders and was carrying a part cargo of general goods laden on Government account. It is otherwise in the case of the *Bonvilston*. The material facts with regard to her, as stated in the seventh paragraph of the case, are these: "The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government, and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria)." That the Mediterranean was the scene of considerable activity on the part of enemy submarines is stated in the sixth paragraph of the case, and this is illustrated by the fact that both the vessels when the collision occurred were, in accordance with naval regulations, proceeding at night at their best speed and showing no lights.

In the absence of any circumstances tending to put a different colour upon the transaction, the carriage in time of war of ambulance wagons and other Government stores from one war base to another war base is carriage for the purposes of the war. It is immaterial whether the wagons and stores are being taken to a base for the purpose of warlike operations to be conducted from that base, or are being fetched away from a base because the warlike operations conducted from it have ceased. In either case the carriage is part of a military operation. It is possible that, as the Master of the Rolls said, there may be circumstances which would prevent such carriage in time of war of Government stores from one war base to another from being in the nature of a military operation. Such circumstances must be of a special character, and it cannot be supposed that if any such circumstances existed in the present case they would not have been stated by the arbitrator. In the absence of all explanation the only rational inference is that the carriage by the *Bonvilston* of the ambulance wagons and the other Government stores formed part of a warlike operation,

and was therefore a war risk under the test on which the parties agreed, as set out in para. 3 of the case.

I think that the same result would have followed under the clause contained in the terms of requisition (para. 2 of case), as a collision caused by the fact that the two vessels were, under war regulations, proceeding in the dark at full speed in time of war without lights, hardly falls within the category of "ordinary sea risks." This, however, is immaterial.

LORD DUNEDIN: My Lords, I concur with the Lord Chancellor and would not add anything were it not that this question has been raised, how far it is legitimate to take judicial notice of certain facts. I should not feel I was justified in resting any conclusion which I formed on such things as the particular dates when certain operations of war were begun or were in progress, when those dates had not been proved but had to be supplied from my own private knowledge. On the other hand, it is settled by authority that a judge may be aware that there is a state of war; and by that I do not understand a vague consciousness such as may have been felt by an ancient Roman when he noticed that the Temple of Janus was open, but an intelligent apprehension of the war as it is and the theatre of the operations thereof. Knowing then that there was a war in the Levant, that the Dardanelles and Syria were the scene of naval and military operations, and that it is found as a fact by the arbitrator that the vessel when lost through collision was carrying stores of a character to be employed in active warfare from one war base (Mudros) to another war base (Alexandria), I consider I have sufficient to warrant me in agreeing with the Court of Appeal that the risk was a war risk in the sense of the indemnity in question.

LORD ATKINSON. My Lords, any difficulty which arises in this case is due to the fact that some of the most important facts were not elicited at the arbitration. The collision took place on January 1, 1916. The *Bonvilston* was then engaged

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in carrying some ambulance wagons and some other Government stores from Mudros to Alexandria. The arbitration took place about five years later. Nothing would have been easier than to have ascertained and proved in the arbitration what was the condition of things at Mudros when the ship *Bonvilston* was loaded there; whether the evacuation of Gallipoli was or was not proceeding; what aid the island of Mudros lent to the process of evacuation, if any; for what purpose were these ambulances sent to Alexandria; was it in order that they should be destroyed, and so put out of the reach of the enemy, or were they to be sent home to England or to some peaceful depot, or was it that they should be used in aid of combative operations then being actively carried on, or about to be instituted by His Majesty's military forces against the military forces of the Turkish Empire, with which His Majesty was then at war? It is much to be regretted that these matters were not inquired into.

It is well established that the Courts of law in this country can take judicial notice of the fact that a state of war exists between this country and some foreign enemy, but I am not at all sure that the Courts of law in this country can take judicial notice of the fact that any particular operation, such as a battle or a siege, an advance or retreat, or the evacuation of a particular field of action actually took place, and much less when such an operation began or ended.

Whether the *Bonvilston*, when carrying these ambulance wagons to Alexandria, was or was not engaged in a "warlike operation" will depend very much, if not entirely, on the purpose for which they were carried there.

In the judgment which I delivered in *Britain Steamship Co.* v. *The King* (1), which I would not have alluded to but that it has been so often referred to, I clearly indicated that this purpose is in such cases a vital matter to be considered. I said: "The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, *for combative purposes*, would, I think, be a 'warlike operation.'" I adhere to that opinion, and I

(1) [1921] 1 A. C. 99, 114.

think the principle applies to the carriage of wagons, ammunition, guns or other material things carried to and discharged at a particular place for the purpose of being used by the forces of the Crown operating in a field of action in which the landing place is situated, in attacking their enemy, or defending themselves against his attacks. I think the words " attacking " and " defending " in this sentence must be taken to include the providing of ancillary things such as beds to lie on, or food to eat, which are necessary to fit the combatants for attack and defence.

Sir John Simon most ingeniously argued that the words " war base " as used in the following passage of the case stated : " She (the *Bonvilston*) was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria) " indicated with sufficient clearness the purposes these things fulfilled at the place from which they were taken, and those they were designed and intended to fulfil at the place to which they were carried. For the purposes of this argument, he distinguished between a "war base" and a "base of supply." A base of supply, he said, is a place where war stores are accumulated and preserved ready to be drawn upon when occasion may require for the needs of the war ; but it may be far distant from the field of war. In that sense the stores in London and elsewhere in this country containing clothes and boots, rifles and ammunition, etc., were in the great war bases of supply ; but he said, as I understood him, that " a war base " meant a place with which the combative forces actually carrying on the war were, as it were, in touch, that it was a place so near to the fighting lines that the goods collected there could be made available to supply the daily needs of the combative forces, whatever position they might hold or occupy in the whole field of war. It was a place to which nothing was brought not deemed to be necessary to supply these needs. If that be so, then it may fairly be inferred that everything brought to such a base is dedicated to the use I have mentioned, and is brought there for the purpose of being available for that use. I have thought

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much over this argument, and have come to the conclusion that it is sound and may be acted upon with safety. In my opinion, therefore, the respondents have been enabled by relying on these words " war base " to discharge the burden of proof that lay upon them. I think they established that the voyage of the *Bonvilston* from Mudros to Alexandria was a warlike operation, that it was the proximate cause of collision, and that the appeal fails and should be dismissed with costs.

LORD SUMNER. My Lords, when the *Geelong* and the *Bonvilston* came into collision, both ships were navigating at best speed at night without lights under imperative Admiralty orders, and the *Geelong*, having the *Bonvilston* on her starboard hand, was the give-way ship. Sir Samuel Evans P., however, found that neither ship was guilty of negligence and this finding is accepted. The whole cause of the collision was that the *Geelong* did not give way and so avoid the collision, because the *Bonvilston* had made herself invisible. She was carrying Government property, so described as to show that, prima facie, it was material of war, transported from one "war base" to another " war base," both in the Levant, and was doing so with lights out for fear of enemy submarines. This operation was the direct cause of the collision. The question is whether it was " warlike " within the agreed effect of the contract.

Had this case been the first of its class to be decided, instead of being the latest, I can understand that some difficulty might have been felt in saying that the operation was warlike, for in itself it was peaceable enough. It was unaggressive ; it was unobtrusive, not to say furtive ; and the *Bonvilston* would have behaved in exactly the same way, if she had been carrying a purely commercial cargo between exclusively mercantile ports. The difficulty is to distinguish this case, if not from previous decisions, for none quite cover the point, at least from dicta more or less closely involved in them. It is not quite satisfactory to say that, if the operation

of carrying troops would be warlike, at any rate when they are in fighting trim, the operation must be also warlike of carrying one or more of those appurtenances without which it would be inhuman to send them into battle. This is after all only an argument from analogy and analogy is often deceptive. "Warlike operations" is an expression deliberately wide and incidentally rather vague, but it has been held that a mere operation during war is not warlike, if it is not also an operation of war. On the other hand, what is more like war than doing with the indispensable equipments of an army such things as have to be done, in order that the army may itself engage the enemy with proper provision for those who fall? I think that the real question is, whether the learned arbitrator found the facts sufficiently to bring the case within this consideration, when he said "she was under requisition by the British Government and was carrying ambulance waggons and other Government stores from one war-base (Mudros) to another war-base (Alexandria)."

My Lords, it is certainly legitimate to consider what is implied in this finding as well as what is expressed in it. "War base" is a term which the special case does not define. I doubt if it has a definition for present purposes. A war base is evidently a place used for certain purposes of military supply in a time and in an area of war. The term is an administrative one and, whatever it may connote in a text-book on the theory of war, in practice it is simply the place chosen by the competent military authority, on which to base other operations of war. A place is, therefore, not a war base because nature made it so or owing to the fitness of things, but because those directing the war chose it for that purpose. I think that a Court of law may with propriety, and I hope with substantial conformity to the fact, presume till the contrary is shown, that Government material of war is not idly shifted from war base to war base, or transported at great cost otherwise than for war purposes. If so, it seems to me to be implicit in the facts found, that this transportation of these stores was a warlike operation. This appears to have been the view of Scrutton L.J., and, subject

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to some comment on the language which he used, it was the view of Bailhache J. also. The learned judge says (1): "if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to convey munitions of war or ambulance waggons for the use of wounded soldiers from one place to another." I do not think that the learned judge meant to say, at any rate with reference to the transport of chattels, that transport of munitions of war from any place to any other place is necessarily a warlike operation. Possibly there may be some difference in the case of the transport of troops, of which it may be said that any transportation of them in time of war is warlike, but, in the case of chattels, I assume that his remark was intended to be directed to the case in hand as found in the special case.

My Lords, the objection is made, that some connection must be shown between the voyage with its termini on the one hand and the chattels transported on the other, and that, if this is not shown, the claimant has not proved his case. If, for example, the Government property was neither taken on board at Mudros nor was intended to be discharged at Alexandria; if it had never belonged to the Mudros stock and was not to belong to the Alexandria stock, then the transport from war base to war base was purely fortuitous and had no connection with the property transported, at least none which would colour the transportation with the quality of being a warlike operation. In certain circumstances it may be that this objection would be valid. If the stores had been shipped in England for Hong Kong, and the calls at Mudros and at Alexandria had been made for ship's purposes or in connection with other cargo, so that they were mere incidents in a prolonged voyage, or if the goods formed but a small part of the lading of the ship, which otherwise consisted of ordinary merchandise, different considerations, I dare say, would arise. It seems to me, however, that we should be imputing to the learned arbitrator

(1) [1922] 1 K. B. 710.

a finding equally irrelevant and misleading, unless we read it as implying a material connection between the termini of the voyage and the object and character of the transportation. I can have no doubt myself that his finding means, that, for good reasons connected with the war, the military authorities in the course of their duty depleted a stock at one war base with the object of increasing that at another, where presumably it would be of more use for the military purpose for which it was primarily designed.

It is further suggested that the Court of Appeal considered the findings of the arbitrator insufficient in themselves to warrant the conclusions drawn by Bailhache J., without the introduction of facts, which had not been found, but which might be supplied on appeal by taking what is called judicial notice of them. These facts appear to have been (1.) that the voyage of the *Bonvilston* synchronised with the evacuation of the Dardanelles, and (2.) that Mudros was so intimately connected with the operations in the Dardanelles, that the evacuation of stores from Mudros might be regarded as part of the evacuation of some of the positions in the Gallipoli Peninsula.

My Lords, to require that a judge should affect a cloistered aloofness from facts that every other man in Court is fully aware of, and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards events which the course of the late war has burnt into the memories of us all. It does not, however, seem to me, as at present advised, that the month and day at or about which a particular military movement was carried out, or that the existence between the Gallipoli Peninsula and Mudros Bay of the relation of active front to supply base, are matters as to which everybody can be deemed to be fully and accurately informed or of which judges can be required, in the legal sense of the words, to take judicial notice; still less is the fact—which is a matter of expert military training—that, in such a relation and about such a

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time, the simultaneous removal of such things as ambulance wagons from the base would have any particular connection with the operations going forward at the active front. At any rate, I have not found any authority which goes nearly so far, and there are many which, surprising as they are in any case, would be absurd, if the rule really went to this extent.

I do not, however, think that this is a true case of taking judicial notice, for that involves that, at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. In the present case the opportunity for introducing new evidence had passed. The question was one of law—namely, what was implicit in the facts stated by the learned arbitrator, who was the judge of fact selected by the parties. As it seems to me, all that the Court of Appeal obtained by noticing historical facts, whether from general recollection or from the report of the case of the *St. Oswald*, was equally to be got by considering that this transportation took place in time of war from one "war base" to another "war base," both situated in the Eastern Mediterranean, and both more or less infested by enemy submarines, and referred to articles which are not primarily subjects of ordinary commerce, but are naturally provided for use in warlike operations, at any rate when they are at a war base. If so, and without more, I think it is right to hold, that in the absence of any contradiction or modification of these facts, this transportation itself was a warlike operation also. Those who carried it out were not indeed combatants, but they were ministering to combatant needs, and were themselves exposed to risk of attack and destruction from combatants on the other side. If not an actual operation of war, this was a warlike operation,

and I think it falls outside the class, which is properly described as being merely operations during war. I therefore think that the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 14, 1922.

Solicitors for the appellant: *Parker, Garrett & Co.*
Solicitors for the respondents: *Ince, Colt, Ince & Roscoe.*

[PRIVY COUNCIL.]

A. HATRICK AND COMPANY, LIMITED Appellants;

AND

THE KING . . . . . Respondent.

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ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Government Railways—Railway Shed used in Conjunction with Harbour Board—Charge for sorting Goods—Power of Railway Department—"In connection with a railway"—Government Railways Act, 1908, *ss.* 2, 10.

By an agreement the Minister of Railways for New Zealand had the management of a wharf the property of the Wanganui Harbour Board, and as agent for the Board collected dues imposed by it. A shed built by the Railway Department, upon its land adjoining the railway, was used by the Department for sorting goods ex ships discharging at the wharf. The Minister by a regulation purporting to be made under s. 10 of the Government Railways Act, 1908, sought to impose a charge for this work, in addition to dues imposed by the Harbour Board, in respect of goods which were not to be carried by railway, but were to be delivered direct to consignees. The section above mentioned empowers the Minister to make charges for goods received into a shed "used in connection with a railway":—

Held, that neither the section and the regulation, or the agreement, empowered the Minister to make the charge.

Judgment of the Court of Appeal reversed.

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* *Present:* Lord Atkinson, Lord Sumner, Lord Parmoor, and Lord Carson.

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APPEAL from a judgment of the Court of Appeal of New Zealand (June 19, 1920) in an action removed into that Court from the Supreme Court for determination.

The action was brought by the Minister of Railways, on behalf of the King, against the appellants. The defence raised the question of the liability of the appellants to pay certain sorting charges imposed by the Minister in respect of goods discharged at Wanganui.

The facts appear from the judgment of the Judicial Committee.

The Court of Appeal (Edwards, Chapman and Herdman JJ.; Stout C.J. and Cooper J. dissenting) held that the Minister had power to make the charges. The appeal is reported at [1920] N. Z. L. R. 542.

1922. Oct. 26. *Sir Lynden Macassey K.C.* and *Bruce Thomas* for the appellants.

Maugham K.C., *Farwell* and *Moulsey* for the respondent.

Nov. 28. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of Appeal of New Zealand in an action instituted by the respondent against the appellants on November 27, 1919, and by order dated March 4, 1920, removed for argument and determination from the Supreme Court of New Zealand into the Court of Appeal.

The appellant company carries on business in the town of Wanganui, which is situated at the mouth of a river of the same name in the North Island of New Zealand.

The appellant company carry on in this town the business of merchants, and are in the habit of importing into the Port of Wanganui merchandise for the purposes of that business. The action out of which this appeal arises was brought to recover, amongst other sums, a sum of 23*l.* 19*s.* 5*d.*, dues and charges in respect of the handling of some of this merchandise in a particular manner, styled sorting, after it had been discharged from the ship that carried it, and before it had been loaded into the appellants' carts or

vehicles, and thus finally delivered to them. The defence of the appellants to this claim is that it is made without any legal right or authority, and that the regulation made on behalf of the Crown, purporting to impose the dues and charges constituting the sum of 23*l.* 19*s.* 5*d.*, was in respect of the goods of the appellants so sorted ultra vires. The validity of that defence is the real question for decision.

The Port of Wanganui is governed and managed by a Board styled the Harbour Board. This Board was constituted and incorporated under the provisions of a statute of New Zealand, the Harbour Act of 1878. By that statute it was empowered, amongst other things, to construct and maintain harbour works as defined, and to erect such machinery as might be necessary for the carrying out of the objects of the Act. Harbour works were defined by s. 8 of the Act as including, amongst other things, any pier, quay, wharf or jetty. The Board was also empowered to appoint such officers (including a wharfinger) to assist in the execution of the Act as it might deem necessary; to make by-laws not repugnant to the provisions of the statute (enforceable by penalties for breaches thereof), for the general control and conduct of the business and proceedings of the Board, and, amongst the other things mentioned s. 215, for the fixing and levying of fees and port charges, for regulating the use of wharves, docks, quays and landing places, and the traffic on the same; and for fixing the scale of fees, tolls and charges to be paid for the use of such wharves or docks; and further for fixing the times, modes and places for shipping and unshipping, landing, warehousing, storing and depositing goods, landing and embarking of passengers; for fixing the tolls and charges to be paid not only for the use of wharves and docks, but the scale of charges to be paid for the storage of goods, and also for the taking of the same into and delivering the same from all warehouses and buildings belonging to or in the occupation of the Board.

It is clear that the by-laws authorized by s. 215 apply only to property belonging to or, in the case of warehouses and buildings, in the occupation of the Board, and have no

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application whatever to property or buildings belonging to or in the occupation of any other body. They do not empower either the Board or such other body to exact any dues or charges in respect of the use or enjoyment of property of the latter description. By s. 69 of the Act it is made imperative on the Board to provide all servants and labourers proper for the working at all reasonable times, any cranes and weighing or other machines or conveniences erected or provided by the Board for the use of the public inloading or unloading any goods on any of the wharves belonging to the Harbour Board. Sect. 70 forbids the giving preference in the loading or unloading of goods. Sect. 71 requires the Board to provide and maintain in good order receiving and examining sheds for the accommodation of customs house officers; and s. 72 enacts that goods shall not be allowed to remain on any wharf or the approaches thereto, or in any store or warehouse in which they may be placed, for a longer time than shall be allowed by the by-laws of the Board; while s. 73 provides for the removal and disposal of goods so left.

By the Government Railways Act, 1894, it is provided that a Minister of the Crown shall be appointed by the Governor on behalf of the Crown to be styled the Minister of Railways, and in the Act called "the Minister," who shall, in addition to the powers thereby conferred, exercise all the powers and functions and have all the duties in respect of the Government railways open for traffic (except the power of taking land for railway purposes) which the Minister for Public Works hitherto exercised. Sect. 4 provides that after the coming into operation of the Act the railways in the Colony then vested in the railway commissioners appointed under the Government Railway Act of 1887, shall again be vested in the Crown, and the management thereof shall pass to the "Minister" to be controlled and regulated under the Public Works Act, 1882, and the Acts amending the same, and that this Act of 1894 and the aforesaid Act of 1887 shall thereupon be repealed.

This statute applies to railways and to these alone, and

does not touch or affect harbours and harbour works. The Harbour Board, at a date not specially given, but probably acting under the powers conferred by the Harbour Act of 1878, had erected a wharf on one of the banks of the River Wanganui. It adjoins a railway station and yards. The property of the Government Railway System is vested in the Minister under the provisions of the Act of 1894.

In the year 1900 there was erected by and at the expense of the Minister, on a piece of land contiguous to that upon which this wharf stands, a shed. As first constructed it was only 182 feet long by 42 feet broad. In the year 1908 the Minister caused it to be extended by an addition 200 feet in length. On July 9, 1900, the Harbour Board, by an agreement entered into between it and the Minister, sought to divide between itself and him the exercise of the rights conferred, and the duties and obligations imposed upon it by the Harbour Act of 1878.

The material clauses of the agreement run as follows: "1. The control of the wharves in connection with the railway shall be solely in the hands of the Minister, who shall also work the traffic on the wharves subject to the by-laws, rules, regulations and rates now or hereafter in force on the New Zealand Railways. . . . . 3. The Minister reserves the right to levy such charges for haulage, handling, storage or carriage as he may from time to time deem necessary. . . . . 5. The Board shall determine the wharfage and harbour improvement rates and berthage dues. 6. Collection of such rates and dues shall be made by the Railway Department. Two and a half per cent. commission on Board receipts so collected to be payable to the Minister. 7. For handling, receiving and delivery of ships' goods or from ships from or to carts, ninepence per ton shall be paid by the Board to the Minister. 8. All goods requiring labour in any shape or form shall be subject to such charge, except in the case of coal and ballast, which owners providing all labour and appliances may receive from or deliver to ships. . . . . 10. The Minister shall not make any charge against the Board in respect of labour for discharging, sorting, or loading goods

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received by the Railway Department by rail for direct shipment, or received from ships to be forwarded direct by rail."

This agreement has been informally renewed from time to time and is treated by the parties thereto as being still in force, except that the rate mentioned in clause 7 thereof has been raised by agreement between the Railway Department and the Harbour Board to 10*d.* per ton.

No question was raised in the Courts in New Zealand as to whether or not this agreement was ultra vires of either of the contracting parties, but it is obvious it could not, as regards an exporter or importer of goods, affect his rights or increase the dues which he was liable to pay. Their Lordships concur with the Chief Justice in thinking that by and under this agreement the true relation in which the Minister stood to the Harbour Board was that of agent appointed to exercise and discharge on its behalf the respective rights and duties purported to be assigned to him.

If that be so, it necessarily follows that the Minister as such agent could not exact from an importer or exporter of goods, dues or charges other than or in excess of those which the Board, his principal, could itself exact without the intervention of the Minister. Before the year 1900 the dues and charges fixed by the Harbour Board for the services rendered and accommodation provided in connection with the receipt of goods from a ship and the delivery of them to the consignees was, as to general goods, 3*s.* per ton.

This sum was collected from the importer or exporter by the Railway Department, 9*d.* per ton (subsequently increased to 10*d.*) was retained by the Minister out of it, and the balance paid over to the Harbour Board. In cases where the consignees did not take delivery of their goods before nightfall on the day of discharge, the goods were stored in a shed, and a charge of 1*s.* per ton was made for removing them from the wharf to the shed and there storing them. If delivery was not taken within twenty-four hours a further charge was made.

The operation styled "sortage" is described by the

plaintiff witnesses, and their evidence is practically uncontradicted. It appears from the plan put in evidence that the wharf is very much longer than the respondent's shed, which is styled a "shipping shed," to distinguish it, apparently, from another shed styled the "goods shed." If the shipping shed never existed, it could scarcely be considered a reasonable delivery by the ship to a local consignee of his goods if ten or twenty separate packages of these goods were scattered along their lengthy wharf, so that the consignee's carter, when he came to take delivery of them for his employers, would have to search for them over a considerable length of wharf and pick them out from the other portions of the ship's cargo which had been unloaded upon the same wharf. Those in charge of the ship are naturally anxious to get her cargo discharged and delivered with all reasonable despatch, so that she may get away or take in other cargo. It is in the interest of the local consignee to have the various packages of his goods collected and placed together at one spot upon the wharf, so that his carters can quickly load and carry them away. If this collection and segregation of the local consignee's goods took place upon the open wharf, it would prima facie be a matter with which the respondent, as owner and operator of the adjoining railway, had no concern.

From the year 1900 to the year 1917 the Department retained for itself, in addition to the 10*d.* per ton already mentioned, 2½ per cent. on the gross sum collected by it for the Harbour Board.

The action out of which this appeal has arisen was brought by the Minister in the name of the Sovereign, not by or on behalf of the Harbour Board, to recover the sum of 142*l.* 11*s.* alleged to be due and owing by the appellants to the Crown. The statement of claim by para. 2, alleged that between April 13, 1918, and May 25, 1918, the New Zealand Government Railway Department received and sorted goods for the appellants at the railway premises at Wanganui. In para. 3 it is alleged that the sum sued for is due and owing by the appellants to the King in respect of freight and wharfage

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on, and the sorting and handling of these goods. In para. 4 it is alleged that of this sum of 142*l.* 11*s.* the sum of 23*l.* 19*s.* 5*d.* is due in respect of sorting charges levied on goods received by the respondent into the railway sheds at Wanganui delivered from the Wanganui wharf. In para. 5 it is alleged that these sortage charges are made and levied by the plaintiff in the action, the Crown, under the authority of reg. 47, made under the Government Railway Act of 1908, on November 14, 1917, and published in the New Zealand Gazette of November 22, 1917.

It will be observed that the claim of the Crown is not rested in any respect upon any right, power, or authority emanating from, or conferred by, the Harbour Board. On the contrary, the right sought to be enforced is an independent statutory right claimed to be vested in the Crown by the provision of this reg. 47, founded on the provisions contained in s. 10 of the Government Railways Act, 1908.

The appellants filed a statement of defence in which they admit that a sum of 118*l.* 7*s.* 7*d.*, portion of the sum sued for, was owing to the Crown in respect of charges other than sortage charges, and alleged a tender of this sum of 118*l.* 7*s.* 7*d.*, and brought that sum into Court; but as to the sum of 23*l.* 19*s.* 5*d.*, denied that this or any other sum was due by them to the Crown in respect of sortage charges as alleged; that the storage charges claimed were as respects the appellants' said goods not made under any lawful authority; and that reg. 47, purporting to impose such charges, was as to them ultra vires.

If no shed had been erected, and this sortage had taken place on the wharf, it could not be reasonably contended that the Railway Department had any concern with it; since the consignee's goods would never have been in fact carried on the railway, never delivered to or placed in the custody or under the control of the Railway Department with the intention or for the purpose of being so carried by it anywhere. That Department would have rendered no service to the consignee in respect of these goods which would entitle it to receive any remuneration from him. One special

peculiarity about the practice is that through traffic pays no charges such as those sued for. If goods are carried by the railway to the wharf for shipment, or discharged upon the wharf to be carried by the railway inland, no dues such as those sued for are levied in respect of them, though they may have been collected and put in one place just as the appellants' goods have been. This goes to show that the claim made in this case is not based upon any work performed by the Department in their character of carriers of goods by rail.

It may well be that the Department should receive from the Harbour Board remuneration for the facilities they afford for proper delivery of goods discharged on the wharf, by permitting the sorting of them to be done in their shed with the aid of some of their staff. That, however, is not at all the matter for decision. The question for decision is wholly different. It is this—whether the Crown, acting through the Railway Department, and entirely independently of the Harbour Board, has a statutory right to exact dues and charges in respect of this sortage, in their shed, of goods never carried on the railway, or delivered to the Department, or placed under its control for the purpose or with the intention of their being so carried. Sortage is in such a case not an operation in any way ancillary to the proper business of the Department as carriers of goods by rail.

Mr. A. K. Harris, the district manager of the respondents at Wanganui, in his evidence described in detail the nature of this operation of sortage. He said: "When the general cargo is received from the ship by the railway men it is placed in a mixed condition upon trollies or sack-barrows at the ship's side. The goods are then removed to the shed, and are sorted into lots according to marks and numbers, so that they may be easily identified when the agent's order is presented. . . . . Up to that point of putting it into heaps the work is done by waterside workers employed by the Railway Department. Then the railway staff of casual labourers deliver the goods to the consignees' carters. In addition to casual labourers, our permanent staff in the shed engaged

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in the delivery and handling of goods is five clerks and two storemen. . . . . The sorting and stacking would be carried out under the supervision of the storeman. The sorting is done by the waterside workers. From delivery from ship's slings to delivery from sheds to carts the work is paid for by the Railway Department. The Department collects from the Harbour Board 10*d.* per ton for the work done on the wharf. The 10*d.* paid by the Harbour Board covers work done on the wharf only. That charge does not include the use of the shed or the work done by staff in the shed." In answer to the Court he then said: "The watersiders bring the goods into the shed, and carry them to stacks under the storeman's supervision. The 10*d.* is credited to the Railway Department by the Harbour Board." He admits that the sorting was done for many years—namely, from 1900 to 1917—as it is now done, without any charge having been made on the consignees. He says that the claim now put forward is a new claim, a war charge, for the doing of something which was formerly done without charge, and was taken to be covered by the 10*d.* per ton retained by the Department out of the money collected by it as agent for the Harbour Board. He then proceeds to show that owing to the rise in the wages of labour, etc., this sum did not cover the cost of the services rendered to consignees by the Department, hence the necessity of exacting this new charge.

On the question of ultra vires these considerations are irrelevant. It may well be, however, that there is another way in which the financial needs of the Department might be met—namely, that the Harbour Board should increase its dues from 3*s.* per ton to 4*s.* per ton, and allow its agent, the Department, to increase its remuneration to 1*s.* 10*d.* and deduct that amount from the sum it collects on behalf of its principal. But however this may be, the question is not what the Department can obtain when acting through and on behalf of the Board, but what it can exact independently of the Board.

Mr. Burgess, the managing director of the appellant

company, when giving evidence, said: "Certain classes of goods do not go into the shed, such as timber, bar iron, cement, and benzine. They are removed by the consignees from the wharf at the end—the foreshore, you may say—in their own conveyances. To so remove them they must cross two sets of rails on the wharf, which are close to the outer side of the wharf where the ship lies. It is necessary to cross the Government Railway property to remove the goods from the wharf into the town. This is allowed. There is nothing to prevent the cargo from being removed from the wharf by consignees. (Cross-examined)—Ships usually come with general cargo. The cargo could not conveniently be removed from the wharf without going into a sorting-shed. The quantity of cargo which arrives makes it commercially impracticable to sort on the wharf."

If Mr. Burgess be right in this last statement it is difficult to see why the Harbour Board, which receives dues and charges from ships carrying cargo to their port, and discharging it on their wharf, should not themselves provide sheds for the purpose of this necessary sorting, either by erecting them or by hiring or otherwise procuring the use of them for this purpose. It is not pretended by the Department that the appellants' goods were brought into the shipping shed for any purpose other than that of being sorted as a step in the delivery of them to the consignees, the appellants.

It was, in the arguments before their Lordships, suggested somewhat faintly but not pressed, that from the fact that the practice of sortage was resorted to without protest, an agreement might be implied as against local consignees to pay to the Department reasonable remuneration for this work of convenience. This point was not raised in the Courts in New Zealand. Evidence was, in consequence, not directed to it. Their Lordships had not before them materials which would enable them to deal with it, and they, therefore, abstain from expressing any opinion upon it. The statute of 1908, upon the relevant provisions of which the question for decision turns, is expressed to be an Act to consolidate certain enactments of the General Assembly relating to the

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maintenance and management of Government railways, and to the management, classification and superannuation allowances of the Government Railway Departments. In its second section it is stated to be a consolidation of the enactments mentioned in the first schedule thereto, and enacts certain provisions which are to apply to them.

These enactments are eleven in number. By the first of them (the Government Railway Act of 1900) (1900 No. 27) the two previous statutes (the Government Railway Acts of 1887 and 1894) are respectively repealed. Its provisions closely resemble those of the Act of 1908; and s. 10 of the Act of 1908, which is much relied upon, is little more than a reprint of s. 11 of the earlier Act of 1900. The remaining ten enactments mentioned in the schedule deal with matters entirely irrelevant to the present inquiry; and none of them refer expressly in any way to harbours or harbour works, or to the discharge or delivery to local consignees of any cargo or any portions thereof discharged in a port of harbour. There is no indication in any of them that the handling or delivery of goods (part of a ship's cargo consigned to local consignees) is an operation ancillary to the proper business of the Department as carriers by rail.

Sect. 2 of the Act of 1908 proceeds to enact that licences, regulations, rules, by-laws, proclamations, etc., and, generally, all acts of authority which originated under any of the enactments mentioned in the schedule or of any of the enactments thereby repealed, and are subsisting and in force on the coming into operation of the Act of 1908, shall enure for the purposes of this latter Act as fully and effectually as if they had originated under the corresponding provisions of the latter statute itself.

The Act of 1908 is by s. 3 divided into three parts. The first, comprising ss. 4 to 48, deals with the maintenance and management of railways, the second (ss. 49 to 68) with the classification of the Department, and the third (ss. 69 to 96) with the Superannuation Fund. By s. 6 it is enacted that, subject to the provisions of the Act, the Minister shall have the management, maintenance and control of every railway

and of the Department. By s. 7, sub-s. 2, it is provided that it shall not be lawful for any local authority or for any person other than the Minister named in the statute, to exercise upon any railway land any of the powers by the section conferred upon such Ministers. All the sections from 4 to 8 inclusive deal exclusively with the railway works. The use or management of them (s. 9) deals with locomotives and their use. Then comes s. 10, dealing with what the Minister so charged with the maintenance, management and control of railways may do by notice published in the Gazette, in discharge, presumably, of the authority conferred and the duty imposed upon him in respect of railways or any specified railway or any part thereof. He may (*a*) fix scales of charges to be paid for persons carried on or using a railway; for goods carried on a railway or received on or into or stored in or delivered from any wharf, pier, jetty, shed or yard "in connection with a railway," or for passengers failing to take out tickets from the booking office of the station whence they started, or for demurrage of any rolling stock, or for the use of cranes, hoists or other machinery for loading or unloading goods, or for the use by any vessel of any wharf, jetty, mooring, building, crane or other appliance "in connection with a railway," or for goods loaded or unloaded from any wharf, pier, jetty, berthage or mooring "in connection with a railway," or for goods received from or delivered from or to any vessel lying at or adjacent to any "such" wharf, pier, or jetty, berthage or mooring. This, owing to the use of the word "such," must mean any wharf, pier, jetty, berthage or mooring "in connection with a railway," but all those things must be done in respect of railways or of any specified railway or any part thereof, and must be something done in the management, maintenance, control, work or business of a railway. In the view of their Lordships these words cannot apply to something done on a space or in a building merely contiguous to or abutting upon a railway, even though it be the property of a railway; if the thing done forms no part of or has no connection with the proper business of a railway, as a carrier of passengers and

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goods by rail, or in other words that the expression "in connection with a railway" means connected with, subserving and being ancillary to, the business of a railway as such carriers. If that were not so the strangest results would follow.

If, for instance, the Minister should allow a shed or yard not at the time needed for the proper work and business of a railway, though contiguous to its lines, to be used by any trader for storing the commodities dealt with in his trade, but which had never been carried on a railway or been sent or intended to be sent anywhere by rail, it would seem to their Lordships impossible to hold that the Minister could, against the will of this trader, fix a scale of charges for the use of the shed or yard by him, or the handling therein of his goods even though their own servant might assist in the handling, for the reason that though the shed or yard might be physically contiguous to the railway, the use of it for the trade carried on or the work done in it was not in any way connected with or ancillary to the business of the railway as carriers of goods.

If the trader should enter into an agreement with the Minister to pay for the use of the yard or shed that would be quite a different matter. There the charge would not be imposed by statute, but secured by contract between the parties.

The definition contained in s. 2 of the Act of 1908 of Government Railway is no doubt very wide. It is defined to mean any railway belonging to His Majesty in New Zealand, and in the case of each railway includes all land belonging to His Majesty or formerly part of any public reserves within the meaning of the Public Reserves and Domains Act of 1908, upon which the railway is constructed, or which is, or is reputed to be, held or used in connection with or for the purposes of the railway, and also all buildings, wharves, jetties, etc., and other movable or immovable property of every description or kind belonging to His Majesty, and situated on such land or held or used or reputed to be held or used in connection with or for the purposes of the railway. This definition does not help to a determination of the question

at issue in this appeal. The wharf in this case does not come within it. It is, though abutting upon the railway, used for the discharge and loading of goods of all kinds, whether they have been carried on the railway or are intended to be carried upon it or not. The shed is similarly used. When the shed is used for the sorting of goods which have been carried upon the railway, or are delivered into it for the purpose of being carried by it, the shed is used for the purpose of the railway and in connection with its proper business as a carrier of goods, but none of these conditions were satisfied in the case of the appellants' goods, nor, indeed, in the case of goods consigned to any local merchant and merely delivered upon the wharf to be brought to the consignees' premises. In their Lordships' view the Department by merely permitting the latter class of goods to be sorted in their shed in the manner described cannot acquire the same statutory right in respect of them that they may have with respect to goods of the former class. If the words "in connection with a railway" used in s. 10 meant merely a place physically contiguous to a railway and nothing more, charges similar to those sued for could be exacted in respect of goods such as timber sorted upon the wharf, which is contiguous to the railway, though the goods were never brought within the shed at all. But this it is admitted cannot be done. These words, therefore, must be directed to some thing different from propinquity or contiguity, and in their Lordships' view, having regard to all the provisions of the statute, mean in s. 10 in connection with the business and operations of a railway as a carrier of goods by rail. In most cases this provision would only be satisfied if the goods were taken to the shed after they had been carried on the railway, or were taken to the shed for the purpose and with the intention of being so carried. Sortage in such a case would form part of the proper business of the railway as a carrier of goods by rail; and the transit of the goods and the handling of them would come within the words of s. 10.

As the goods of the appellants did not fulfil this latter condition in their Lordships' view, the words of this section

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did not apply to them, nor does reg. 47 passed under its provision. As regards these particular goods of the appellants, in respect of the sorting for which the sum of 23*l.* 19*s.* 5*d.* is sued for, that clause is therefore illegal and indefensible. They are, therefore, of opinion that the appeal succeeds, that the decision appealed against was erroneous and should be reversed, and that in respect of the respondent's claim for 23*l.* 19*s.* 5*d.* judgment should be entered for the appellants with costs, and that the respondent should pay the costs of the appellants, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Shaen, Roscoe, Massey & Co.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

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ENGINEER MINING COMPANY, LIMITED, AND ANOTHER . . . . . } APPELLANTS;

AND

FRASER AND OTHERS . . . . . RESPONDENTS.

APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada (British Columbia)—Mining Claims—Expiration of Free Miner's Certificate—Absence of equitable Title—Transfer of Mining Claims—Mineral Act (R. S. B. C., 1897, *c.* 134), *s.* 9.

Having regard to s. 9 of the Mineral Act (R. S. B. C., 1897), a person whose free miner's certificate has expired has no vested interest or equitable right in a mining claim, even if he has expended money on development and has applied for a certificate of improvements.

A general transfer of the assets of a company is not an effectual transfer under the above Act of mining claims included in the assets but not particularised so that a transfer can be duly recorded.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal for British Columbia (June 6, 1922), affirming a judgment of Clement J. (October 5, 1921).

* *Present:* VISCOUNT HALDANE, LORD SHAW, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

The action was brought by the appellant company in the Supreme Court of British Columbia against the respondents, the administrator of the estates of James Alexander and of A. I. Smith, and others, to establish the right of the company to certain mining claims in the Atlin Mining Division of that Province. The Attorney-General for the Province had been joined as a plaintiff.

The trial judge (Clement J.) dismissed the action, and his decision was affirmed by the Court of Appeal (MacDonald C.J.A. and Galliher J.A.; McPhillips J.A. dissenting).

The facts sufficiently appear from the judgment of the Judicial Committee.

1922. Nov. 16. *E. C. Mayers* for the appellants. The appellant company had acquired a vested interest in the claims. After their application for certificates of improvements the Crown was trustee for the company. Nothing short of twenty years' adverse possession, under the Statute of Limitations, availed to bar the rights of the company. The company was entitled to certificates of improvements upon its application, and is to be considered as though certificates had been issued. They are not to suffer by the error of the officials: Mineral Act, s. 53. Further, Alexander's title was affected by fraud, in that he acquired with knowledge of the circumstances. The company does not rely upon the Attorney-General being a party. [Reference was made to the Mineral Act (R. S. B. C., 1897, c. 184), ss. 9, 12, 37, 53, 59, 76; *Reid* v. *Collister* (1); *Tanghe* v. *Morgan* (2); *Noyes* v. *Mantle* (3); *Benson Mining Co.* v. *Alta Mining Co.* (4); see also 2 Geo. 5 (B. C.), c. 157, ss. 8, 13.]

Reginald Symes for the respondents was not called upon.

Dec. 16. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Court of Appeal of British Columbia dated

(1) (1919) 59 Can. S. C. R. 275.
(2) (1904) 2 Martin's Mining Cases, 178.
(3) (1888) 127 U. S. 348.
(4) (1892) 145 U. S. 428.

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June 6, 1922, affirming a judgment of Clement J. of October 5, 1921.

The respondents are the legal representatives of James Alexander, who died on October 26, 1918. Mr. Alexander, for some years before his death, had caused certain mineral claims to be located, and it is admitted that at his death he had obtained for all these claims Crown grants. He had accordingly, and his representatives have, unless these grants be put out of the way, a statutory title to these mineral claims and all that they embraced.

The ruling statute on the subject is the Mineral Act, Revised Statutes of British Columbia, 1897. This, according to the practice of the Province, consolidates previous statutes upon the same subject.

The object of this suit is substantially for the ejectment of the respondents as Alexander's representatives from the mineral claims in question. The plaintiff company claims to be the true owner of these claims. A decree is asked cancelling and setting aside the Crown grants to Alexander, although the mines and minerals embraced therein were possessed under the Crown by him and his successors from the date of the grants until now. This demand being upheld, ejectment of the respondents would follow.

The appellants claim anterior, and superior, and still existing rights in the subject of the grants. It is unnecessary to go into the details of this case, which, in the opinion of the Board, is, on its merits, very clearly settled by reference to the sections of the Minerals Act about to be mentioned.

Suffice it to say that in the year 1899 gold was discovered in Northern British Columbia, and twelve claims were staked out therein. The owners formed a mining partnership under the name of the Aga Gold Mining Company, their agreement being filed with the Mining Recorder at Atlin in February, 1900. In the same year the Engineer Mining Company (the appellant company) was incorporated, apparently intending to take over the assets and business of the Aga Company.

No title, however, to any of the claims was ever furnished

by the Aga Company to the appellants, and no record of any transfer or title was filed with the Mining Recorder. In 1906, however, the appellant company produced from time to time documents purporting to transfer, not the whole, but very nearly the whole, of the mining claims which had been staked by the original claimants. Counsel for the Crown gave the opinion that as the claims were vested in the Aga Company they could only be transferred by the company itself.

Notwithstanding all that has been said in argument, it is plain beyond question that the appellant company accepted that position. It went so far as to ask a return of the fees paid by it to the Government. The voucher of April 29, 1907, is produced for $32.50, being "for refund of mining rights." In gremio of the receipt occurs the following: "Receipts issued for the record of certificates of improvements for thirteen mineral claims, which certificates were not issued as the claims were not valid existing claims." This receipt is signed by the secretary of the appellant company. This is the same company as now claim in this appeal to have an existing fundamental equitable title to these claims, and the minerals embraced therein, a title sufficient to give them a right to demand the cancellation of Crown grants given to Mr. Alexander and acted upon and possessed under during all the years prior to the institution of this suit—namely, from 1907 to 1920.

The demand seems audacious enough; and, in their Lordships' opinion, agreeing with that of the Courts below, it is wholly without foundation in law. It need only be added by way of narrative, that in 1907 the appellant company had their grant re-located in the name of several parties representing and interested in it. These re-locators "failed to do and record the requisite assessment work required to be done and recorded by the Mineral Act, and, therefore, by force of the Act itself, these re-locations expired on the effluxion of the time for recording the work. In addition to allowing the claims to expire, the company allowed its free miner's certificate to lapse, and lost its legal status as a company entitled to hold mineral claims in this Province. It did not rehabilitate itself until several years thereafter." These sentences are quoted

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from the opinion of the learned MacDonald C.J., and the points of the narrative were assented to at the bar as correct.

Their Lordships are of opinion that s. 9 of the statute directly applies to such facts : " Subject to the proviso hereinafter stated " (none of the conditions to the proviso bear upon the point) " no person or joint stock company shall be recognised as having any right or interest in or to any mineral claim or any minerals therein, or in or to any water right," etc., " unless he or it shall have a free miner certificate unexpired, and on the expiration of a free miner certificate the owner thereof shall absolutely forfeit all his rights or interests in or to any mineral claim and all or any minerals therein . . . . unless such owner shall on or before the day following the expiration of such certificate obtain a new free miner certificate."

As already indicated, the appellant company's certificate expired, and it remained expired from about the year 1907 to the year 1920. It is said that, notwithstanding this, and notwithstanding the same mineral claims having been the subject of fresh Crown grants to other persons, the appellant company retain what was said in argument to be a fundamental equitable title to the mining claims. In the opinion of their Lordships, no countenance can be given to such an idea. It is not only expressly antagonistic to the comprehensive exclusion from claims and minerals of any rights and interests therein as the statute declares, but it would introduce uncertainty into mining rights in the Province, and confusion into both the records and administration thereof. It cannot be supposed that such comprehensive language could be employed and yet leave open the opportunity to undermine these mineral rights by some alleged reserved equitable title.

This, in the opinion of the Board, would be sufficient to dispose of the claim. A word, however, may be added as to the appellant company, at whose instance this suit is brought. It is a company which had itself disappeared for many years from even the register of companies in the Province. Shortly before this action was raised, it applied to get itself again on the company register, the idea apparently being that while the

company had itself disappeared as a legal entity entitled to hold mining rights, it could be resuscitated so as to be restored again into activity some day, and enable it to go back upon the period of its disappearance, claiming that some equitable title in the non-existent legal entity remained dormant but capable of re-assertion. This results in a mere confusion, opposed at once to legal possibility and to sound administration.

Another matter was also fully argued, and their Lordships think it right to deal with it. Sect. 53 of the Act provides that " no free miner shall suffer from any acts of omission or commission or delays on the part of any Government official if such can be proven." It was added to this that the application of the appellant company in the year 1906 to be recorded as the owner of the Aga Mining Company's claims to the transferee was wrongfully refused because there was a transfer from the Aga Company of its assets, and upon a scrutiny or calculation it would have been discovered that the Aga Company's assets included these mining claims. Their Lordships desire to make it clear that, in their view, a general transfer of assets does not meet the requirements of the statute. Mining claims are geographically entities, they are separately numbered or named, and the record of each should be in such a position as to be separately traceable. Otherwise records in the Province would be deprived of much of their legitimate value. It is a simple thing to demand that the claim itself should be directly transferred ; such rights should not be left, quo ad the records, to inferential treatment. Allusion has already been made to the fact that the appellant company now challenging the action of the Government Mining officials as improper, accepted and acted upon it, got its applicants' fees returned to it, and disappeared from the ground. It would accordingly upon general legal principle appear to be completely barred from raising the present question after third parties' rights have without fraud come into existence. But apart from that, in the opinion of the Board, the action of the Government officials was right.

It is said not only that the action was wrong, but that Mr. Alexander knew that it was wrong, and that he can

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constructively be charged with fraud. There are, in the opinion of the Board, no grounds for such a charge, and no considerations of fraud enter into the determination of the rights of parties in this case.

This being so, s. 37, sub-s. 1, accordingly and plainly applies to the certificate of improvements issued to Mr. Alexander. "A certificate of improvements, when issued as aforesaid, shall not be impeached in any Court on any ground, except that of fraud." It is unnecessary to refer to sub-s. 2 of that section under which the claim now made by the appellants would appear to be completely excluded also because of not having been presented as that of an adverse claimant within the period of sixty days from the publication of the notice of Mr. Alexander's claim.

MacDonald C.J., as did Clement J., founded his judgment upon this section; and in their Lordships' opinion the views expressed by these learned judges are entirely correct; but, in deference to the dissenting opinion of McPhillips J. and in view of the full argument presented to the Board, their Lordships have dealt with the further points as above.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs against the appellant company.

Solicitors for appellants: *White & Leonard.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

[PRIVY COUNCIL.]

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE (OF LONDON) AND OTHERS . . . . . } APPELLANTS;

AND

KINGSLEY NAVIGATION COMPANY, LIMITED . . . . . } RESPONDENTS.

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ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada—Shipping—Carriage by Water—Fire—Unseaworthiness—Cause of Loss—Onus of Proof—Water Carriage of Goods Act (9 & 10 *Edw.* 7, *c.* 61), *ss.* 4, 7.

The appellants sued the respondents to recover for the loss of lime in barrels shipped in the respondents' barge for carriage, and destroyed by fire in the course thereof. The carriage was subject to the provisions of the Water Carriage of Goods Act, 1909, of Canada. The barge was unseaworthy to the knowledge of the respondents' manager, and leaked badly in consequence. A possible cause of the fire was heat generated by the action on the lime of the water which thus entered the barge.

Sect. 4 of the Act renders any clause, covenant or agreement illegal, null, and of no effect which purports to relieve the owner, charterers, or agent of any ship, or the ship itself, from obligations to make and keep the ship seaworthy; s. 7 provides that "the ship, the owner, charterer, agent, or master shall not be held liable for loss arising from fire" (or other specified risks) "or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees":—

Held, that the loss was directly, though not proximately, attributable to the unseaworthiness, and therefore was not a "loss arising from fire" within s. 7 of the Act, and that the respondents were liable; so held apart from consideration of the onus of proof.

Held, further, that under s. 7 the onus was upon the respondents to show that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants or employees.

Asiatic Petroleum Co. v. *Lennard's Carrying Co.* [1914] 1 K. B. 419; [1915] A. C. 705 applied.

Judgment of the Court of Appeal reversed.

APPEAL (No. 97 of 1922) from a judgment of the Court of Appeal of British Columbia (June 6, 1922) reversing a judgment of the Supreme Court of that Province.

* *Present:* VISCOUNT HALDANE, LORD SHAW, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

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The action was brought by the appellants, the Corporation of the Royal Exchange Assurance (of London) and the Pacific Mills, Ld., to recover from the respondents damages for the loss by fire of 3000 barrels of lime consigned by the Pacific Mills, Ld., for carriage by the respondents' barge. The Corporation as insurers had paid a total loss and sued as assignees of the claim.

The facts of the case appear from the judgment of the Judicial Committee.

In addition to ss. 4 and 7 of the Water Carriage of Goods Act (9 & 10 Edw. 7, c. 61, Dom.), the material provisions of which appear in the headnote, the respondents relied on the Canada Shipping Act (R. S. Can., 1906, c. 113), s. 964. (1)

The trial judge (Macdonald J.) found that the barge was unseaworthy; he held that the onus was upon the respondents to prove that the unseaworthiness had not caused the loss, and that they had failed to discharge that onus. He accordingly gave judgment for the plaintiffs.

Upon appeal to the Court of Appeal the judgment was reversed. Macdonald C.J., with whom Galliher J.A. agreed, held that the onus was upon the appellants to prove that the unseaworthiness caused the loss, and that they had failed to discharge that onus; if the onus had been upon the respondents, he agreed with the trial judge that they had not discharged it. Martin J.A. and Eberts J.A. gave no reasons. McPhillips J.A. considered that the Water Carriage of Goods Act relieved the carrier whenever a loss by fire occurred; he further doubted whether unseaworthiness was proved, and was of opinion that if it were, it was not proved that the unseaworthiness caused the fire.

1922. Nov. 17, 20, 21. *E. C. Mayers* for the appellants.

(1) Shipping Act (R.S. Can., 1906, c. 113), s. 964. "Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens,—(*a*) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees; or, (*b*) by reason of fire or the dangers of navigation; or (*c*) from any defect in or from the nature of the goods themselves; or (*d*) from armed robbery or other irresistible force."

The barge being unseaworthy there was no exception from liability upon which the respondents could rely. Upon the true construction of s. 7 of the Water Carriage of Goods Act, the immunity given is conditional upon the ship being seaworthy, or every means having been taken to make her so. Sect. 7 must be read in conjunction with s. 4, which makes due diligence in making and keeping the ship seaworthy a fundamental condition, as it is a common law. The view of the Court of Appeal in England in *Virginia Carolina Chemical Co.* v. *Norfolk, etc., Steam Shipping Co.* (1) that the immunity given by s. 502 of the Merchant Shipping Act, 1894, to a shipowner in the case of fire avails him even if the ship is not seaworthy, was based upon the consideration that there was nothing to preclude him from contracting out of his obligation; but by s. 4 of the Canadian Act the owner is so precluded in Canada. Under the Harter Act of the United States (2) the immunities given have been held to be subject to the warranty of seaworthiness: *The Southwark* (3); *The Wildcroft* (4), citing Kennedy in *Rowson* v. *Atlantic Transport Co.* (5) If s. 7 is not subject to the absolute condition contended for, the onus was upon the shipowners to prove that the loss occurred without their fault or privity, as it has been held to be under s. 502 of the Merchant Shipping Act, 1894: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (6); *Ingram & Royle* v. *Services Maritimes du Tréport.* (7) The respondents, who through their manager were responsible for the unseaworthiness, failed to show that it did not cause the fire; that it was at least a possible cause appears from the evidence. Sect. 964 of the Canada Shipping Act (R. S. Can., 1906, c. 113) is subject to s. 963 just as s. 7 of the Water Carriage of Goods Act is subject to s. 4 of that Act. If the latter Act places the shipowners in a more favourable position than the Water Carriage of Goods Act, it must be taken to be repealed by that Act.

(1) [1912] 1 K. B. 229.
(2) See Carver's Carriage by Sea, § 103A.
(3) (1903) 191 U. S. 1, 7.
(4) (1905) 201 U. S. 378, 386.
(5) [1903] 1 K. B. 114.
(6) [1915] A. C. 705; affirming [1914] 1 K. B. 419.
(7) [1914] 1 K. B. 541.

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But even if the onus was upon the appellants, the evidence shows that the leakage due to the unseaworthiness was the cause of the fire. It was the effective cause, even if it was not the proximate cause : *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (1) It being established that the barge was unseaworthy, the onus is on the respondents to show that the fire was not due to that breach of warranty : *Joseph Travers & Sons* v. *Cooper.* (2)

Reginald Symes for the respondents. Sect. 7 of the Water Carriage of Goods Act is not subject to the condition contended for. The immunity given in the case of fire is expressed absolutely, the immunity where the loss occurs without the shipowner's fault or privity being expressed as a separate and additional immunity. That the immunities are distinct appears by a comparison with s. 964 of the Shipping Act in which the two immunities are separately lettered. Neither section reproduces s. 502 of the Merchant Shipping Act, and decisions with regard to the construction and effect of that section are not in point. The onus was upon the plaintiffs to show that the fire was caused by the unseaworthiness. The Court of Appeal rightly held on the evidence that they had not so shown ; the trial judge was of the same opinion, but held that the onus was upon the defendants. In *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (3) it was treated as admitted that the fire arose directly from the unseaworthiness.

E. C. Mayers replied.

1923. Jan. 23. The judgment of their Lordships was delivered by

LORD PARMOOR. Early in the month of November, 1920, the Pacific Mills, Ld., contracted to buy from the Pacific Lime Co., Ld., 3000 barrels of lime, to be consigned to them at Ocean Falls, on board a barge called the *Queen City.* The *Queen City* belonged to the respondents, the Kingsley Navigation Co., Ld. The barge left Blubber

(1) [1918] A. C. 350, 369. (2) [1915] 1 K. B. 73, 87, 88.
(3) [1915] A. C. 705.

Bay, a port on Texada Island, on November 10, 1920, loaded with 3000 barrels of lime, and some soda ash, and proceeded in tow of a tug to Beaver Cove, a port on Vancouver Island, reaching Beaver Cove on November 11, 1920, at 6 in the morning. On the same morning, at 7 o'clock, smoke was observed rising from the after hatch. The *Queen City* was towed away into deep water, where she and her cargo were completely burnt and destroyed. The Pacific Mills, Ld., had insured the cargo with the Corporation of the Royal Exchange Assurance, and that company paid to them the amount of the loss, taking an assignment of their claim against the Kingsley Navigation Co.

On May 26, 1921, the Assurance Company, and the Pacific Mills, Ld., joined in an action against the respondents to recover the value of the lost lime. The judge of first instance in the Supreme Court of British Columbia gave judgment in favour of the appellants, but that judgment was reversed by the judgment of the Court of Appeal of British Columbia of June 6, 1922. This is an appeal from the judgment of the Court of Appeal, and the judgment of the Supreme Court is sought to be restored.

The appeal raises questions of considerable importance on the construction of the Water Carriage of Goods Act (9 & 10 Edw. 7, c. 61) enacted by the Parliament of Canada on May 4, 1910.

The barrels of lime were carried under the terms of a bill of lading, which was probably lost when the cargo and barge were burnt. Their Lordships agree in the finding that the lime was intended to be shipped on the terms of a bill of lading in accordance with the usual custom of shipments of this character then prevailing in the coasting trade. The indorsement on such a bill of lading would include the following term: "Shipment covered by this bill of lading is subject to all the terms and provisions of, and to all the exemption from liability contained in, the Act of Parliament of Canada known as the Water Carriage of Goods Act. This bill of lading and all matters arising thereunder shall be subject to, and interpreted according to, the law of England

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in so far as the same is not repugnant to the provisions of the same Act." This indorsement subjects the shipment of the barrels of lime to all the terms and provisions of the Water Carriage of Goods Act, and the case, as argued before their Lordships, depends upon the construction of that Act.

Apart from any limitation of liability, either by statute, or agreement, a carrier of goods by sea is liable as insurer of the safety of the goods which he undertakes to deliver, and further warrants that the vessel, in which the goods are intended to be carried, is seaworthy at the time when the goods are placed on board; in other words, that the vessel has that degree of fitness, in relation to the character of the goods to be carried, which a prudent owner of the goods would require a vessel to have at the commencement of a voyage, in view of all probable conditions and contingencies. It follows that, apart from the protection of the Water Carriage of Goods Act, the respondents would be liable. The case for the respondents is that they are within the exceptions from liability, created by that Act, in favour of the shipowner.

The first important section is s. 4. This section (inter alia) renders any clause, covenant, or agreement illegal, null and of no effect which purports to relieve the owner, charterer, or agent of any ship, or the ship itself, from obligations to exercise due diligence to make and keep the ship seaworthy.

There is nothing in this section which prohibits a shipowner from contracting out of his common law liability to warrant the absolute seaworthiness of the ship, but he cannot contract out of the obligation to exercise due diligence to make and keep the ship seaworthy. The relevant facts in the present case are as follows: On November 2, 1920, at the request of the Pacific Lime Co., owners and operators of the *Queen City*, Captain Cullington, surveyor to the Board of Marine Underwriters of San Francisco, California, proceeded on board the *Queen City* to complete an internal survey, supplementing a survey held on September 11, 1920. Captain Cullington made the following report: "Found upon examination a part of the ceiling rotted, also the sternpost rotted so badly that it was almost reduced to pulp, and, from

conditions as existing in and around the transom, it is my opinion that the horn timber, also the rim of counter, is affected by rot, and in consequence of the conditions, as found, I cannot recommend this vessel as a risk to underwriters."

Captain Cullington stated it did not necessarily follow that because a vessel could not be recommended for insurance it was not seaworthy, but he left no doubt on the mind of the trial judge that, in his opinion, owing to the conditions in which he found the ship on November 2, 1920, he did not consider her seaworthy. This opinion was further corroborated by the evidence of J. K. McKenzie, superintendent of the British Marine and Shipbuilding and Repair Co., who stated that he had been asked by Captain Cullington to have a look on the inside of the *Queen City*, and that he would not call her seaworthy, if she had rotten wood in her. It is, however, not necessary to pursue this matter further, since both Courts concurred in the finding that the ship was not in a seaworthy condition to carry a cargo of lime, on evidence which, in the opinion of their Lordships, is conclusive.

It remains to consider whether the respondents did exercise due diligence to make and keep the *Queen City* seaworthy. Mr. Mather, the first witness called at the trial on behalf of the respondents, was general manager both of the Pacific Lime Co. and of the Kingsley Navigation Co., and acted throughout the whole transaction as the representative of these two companies. He was present on the occasion of the inspection of the ship by Captain Cullington, before the issue of the report of November 2, and the report must have come to his knowledge before the loading, on the *Queen City*, of the cargo of lime. No doubt there is some difference in the recollection of Captain Cullington and Mr. Mather as to the conversation which took place on the occasion of the inspection of the ship before the November report, but Mr. Mather's own answers, in cross-examination, leave no doubt that he knew the condition of the ship at the time, although he was not prepared to accept the actual language, which had been used, according to the recollection

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of Captain Cullington. Mr. Mather says that you could pull handfuls of wood out of the top of the sternpost, and that if Captain Cullington had said that the top was reduced to pulp it would have been quite correct, and that, although he did not think the first stage of decay had set in all along the ceiling, it had set in in places. The manager of a company, who had received the report of the survey of Captain Cullington, and then sent the ship to sea with a cargo of lime in the condition to which that report testifies, cannot be said to have exercised due diligence to make and keep the ship seaworthy. In addition, there is ample evidence that the actual conditions of rot which affected the ship, and rendered her unseaworthy, were known to Mr. Mather on his own personal inspection. The respondents are a limited company, as were the defendants in the case of *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1) They could only act through some individual as their alter ego, and they did so act through Mr. Mather. The result is that, as the owners of the *Queen City* did not exercise due diligence to make and keep the ship seaworthy, no clause, covenant, or agreement to escape liability, under this head, would have protected them from a claim for the loss of cargo, and any such clause, covenant, or agreement would have been illegal, null and void, and of no effect, unless it had been in accordance with other provisions of the Act. In the present case there is no suggestion that the other provisions of the Act would have operated to render valid such a clause, covenant or agreement.

Sect. 6 of the Act protects the owner of a ship, who exercises due diligence to make the ship in all respects seaworthy, against responsibility for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect. In the present case the loss of the lime cargo is not attributed to any of these causes, and in any case the protection would not operate to release the respondents from liability, since, as above stated, they did not exercise due diligence to make the *Queen City* in all respects seaworthy.

(1) [1914] 1 K. B. 419.

The section on which the respondents in substance rely for exemption from their common law liability is s. 7. The first question which arises under this section is whether the loss of the cargo, which followed on an outbreak of fire, is a loss "arising from fire." Captain Cullington states that the effect of the rot which he saw would be that the vessel would lose the effect of the strength of the stern-post, and also of the ceiling, and that there would be a tendency to make the planking work open at the seams, causing her to leak, and to take in water. If this leakage was of such an extent that the water rose above the level of the bottom of the barrels containing the lime, there would be a tendency to oxidation and combustion, and the creation of a heat atmosphere sufficient to ignite the wooden structure of the vessel. It is said, however, on behalf of the respondents, that the *Queen City* had only taken in twelve inches of water in twenty-four hours, which would prove that there was no considerable leakage, and that the depth of the water was not sufficient to affect the lime cargo. Evidence was given by Walter Ford, the captain of the *Queen City*, that at 6 o'clock in the morning he had sounded the depth of water, and found there was not sufficient to affect the lime cargo, but under cross-examination it appeared that he did no more than drop an iron rod, on which there were no marks of inches or feet, down the sounding hole; in truth, he was not in a position to make more than a conjecture as to the depth of the water. Moreover, the soundings were taken an hour before there was any sign of the outbreak of the fire, leaving time for a marked increase in the depth of the water if the *Queen City* had sprung leaks to any considerable extent. On the hearing of the appeal, the counsel for the respondents placed the main weight of his argument on the evidence of Walter Ford as to the depth of water, but the trial judge does not appear to have given any weight to this evidence. Their Lordships regard it as quite insufficient to establish the proposition that the outbreak of fire could not be due to the heat generated by the contact of water with a lime cargo. There is a further passage in Ford's evidence which corroborates

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this conclusion. He states that he knew that the union of lime and water produced heat, and that this was the reason why he did not turn water on the *Queen City* when he ascertained that she was burning. The unseaworthiness of the *Queen City* was, therefore, of such a character as to render probable a considerable leakage, and the influx of sufficient water to come into contact with the lime cargo, and thus to generate heat which would be sufficient to ignite the timbers of a wooden ship constructed on the lines of the *Queen City*.

Mr. Mather, in his cross-examination, was unable to make any alternative suggestion of the origin of the fire, except that of the heat generated by the contact of lime and water. He added, with perfect candour, "Well, frankly, I will tell you that nothing has occurred to me, or anybody that I have spoken to, except the combination of lime and water." Their Lordships cannot doubt that the unseaworthiness of the *Queen City* was the natural and direct cause of leakage, sufficient to bring water into contact with the lime cargo, and that the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of s. 7. The train of causation, from the unseaworthiness of the *Queen City* to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1), the proximate cause of a loss is not necessarily the cause nearest in time.

The question of onus is not material in these circumstances; but if a shipowner seeks to escape liability, on the ground that the loss arose from fire, the onus of showing that the loss did arise from fire is affirmatively upon him.

In order, therefore, to escape liability, the respondents must be able to prove, under the later words of the section, that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants, or

(1) [1918] A. C. 350, 369.

employees. Under the terms of s. 502 of the Merchant Shipping Act, 1894, the owner is not liable to make good to any extent whatever any loss or damage happening without his actual fault or privity where (inter alia) goods on board his ship are lost or damaged by reason of fire on board the ship. It has been held under this section that parties who plead the section must bring themselves within its terms, and that the whole onus lies on the shipowner to prove that the loss has happened without his actual fault or privity: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1); *Ingram & Royle* v. *Services Maritimes du Tréport.* (2) In the latter case Kennedy L.J. says that the party who is relying upon the provisions of s. 502 of the Merchant Shipping Act, 1894, has not merely to show that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to show affirmatively that the loss happened without his actual fault or privity.

Their Lordships are of opinion that the same principle applies in the construction of s. 7 of the Water Carriage of Goods Act, and that therefore the onus was upon the respondents to show that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants or employees. The words "actual fault or privity" include acts of omission, and if an owner has means of knowledge which he ought to have used, and does not avail himself of them, his omission so to do may be a fault, and if so, it is an actual fault, and he cannot claim the protection of the section: *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.*, per Buckley L.J. (3)

It is not necessary to analyse further the words "actual fault or privity," since the loss must also be without the fault or neglect of the agents, servants or employees of the respondents, and, quite apart from any question of onus, it is impossible to say in the present case that the loss arose without the fault or neglect of Mr. Mather, who, having seen the report of Captain Cullington, and himself being

(1) [1915] A. C. 705; affirming [1914] 1 K. B. 419.
(2) [1914] 1 K. B. 541.
(3) [1914] 1 K. B. 419, 432.

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cognisant of the rotten condition of the timbers in the *Queen City*, sent her to sea with a cargo of lime.

A reference was made during the argument to the American Act known as the Harter Act, which was passed by Congress in February, 1893, and came into operation on July 1, 1893. This Act prohibits clauses which relieve shipowners from liability for the consequence of not exercising due diligence to make a vessel seaworthy, and capable of performing her intended voyage, and exempts shipowners from liability resulting from certain losses where they have exercised "due diligence to make the vessel in all respects seaworthy." In the opinion of their Lordships, it is not necessary to express any opinion on the construction of the Harter Act, in construing the provisions of the Water Carriage of Goods Act, but so far as the provisions of the Harter Act have been brought to their notice, there appears no inconsistency between its provisions and the construction which they have placed upon the Canadian Act. The provisions of the Harter Act were considered by Channell J. in *McFadden* v. *Blue Star Line.* (1) That learned judge held that the immunity clause did nothing more than give immunity in respect of fire arising from certain specified causes in the course of the voyage, provided the shipowners had exercised due diligence to make the ship seaworthy.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Macdonald J. restored, and that the respondents do pay the costs of the appellants in the Court of Appeal of British Columbia and on this appeal.

Solicitors for appellants: *White & Leonard.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

(1) [1905] 1 K. B. 697.

[PRIVY COUNCIL.]

GRANBY CONSOLIDATED MINING, SMELTING AND POWER, ETC., COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Taxation—Income Tax—Supplementary Assessment—Taxpayers' Right to Discount—Taxation Act (R. S. B. C., 1911, ch. 222), ss. 10, 103.

The appellants were assessed to income tax in British Columbia in respect of their mining profits for the years 1917 and 1918 by a supplementary roll, made on July 12, 1921, under s. 103 of the Taxation Act (R. S. B. C., 1911, ch. 222):—

Held, that the assessments were not attached to, or a part of, the annual roll for 1920, but a separate roll for 1921, and accordingly that upon the appellants paying by June 30, 1922, they were entitled to the discount allowed by s. 10 of the Act.

Judgment of the Court of Appeal reversed.

APPEAL (No. 98 of 1922) from a judgment of the Court of Appeal of British Columbia (June 6, 1922) reversing the judgment of the Supreme Court of that Province.

The action was brought by the appellants in the Supreme Court of British Columbia for a declaration that they were entitled to the discount allowed by s. 10 of the Taxation Act (R. S. B. C., 1911, ch. 222) upon payment of the income tax on its income for the years 1917 and 1918 by June 30, 1922.

The facts and the relevant statutory provisions of British Columbia appear from the judgment of the Judicial Committee.

The trial judge (Murphy J.) delivered judgment for the present appellants. Upon appeal to the Court of Appeal that judgment was reversed.

* *Present:* VISCOUNT HALDANE, LORD SHAW, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

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1922. Nov. 21, 23, 24. *E. C. Mayers* for the appellants. *Clauson K.C.* and *Hon. Geoffrey Lawrence* for the respondent. The arguments were directed solely to the construction of the provisions of the Taxation Act.

1923. Jan. 26. The judgment of their Lordships was delivered by

LORD WRENBURY. In this action the appellants, who are taxpayers, sue for a declaration as to their rights and liabilities under the Taxation Act, ch. 222, of the Revised Statutes of British Columbia and the amendments thereto. The question is whether they are entitled to the 10 per cent. discount in respect of income tax allowed by s. 10 of the Act, ch. 222, being the Act of 1911. The writ was issued on November 8, 1921. The appellants' rights are to be determined as at that date.

The appellants are a mining company working copper mines in the Province, and as such they were, until the year 1917, not subject to income tax. They were taxed at the rate of 2 per cent. on their output.

By virtue of the Taxation Act Amendment Act, 1917, as amended by the Taxation Act Amendment Act, 1918, the appellants became from the year 1917 inclusive liable for income tax, or for the 2 per cent. tax on output, whichever should be the greater, with a provision that the 2 per cent. tax should be collected quarterly, and if the income tax should prove to be the greater, then the quarterly payments of the 2 per cent. should be treated as part payment of the income tax during the corresponding period.

In respect of the years 1917 and 1918 the appellants duly paid the 2 per cent. tax, but for some reasons which do not appear, but under circumstances for which the respondent admits that the appellants are in no respect to blame, the appellants were not assessed for income tax for those years. The revenue authorities seem to have omitted to remember that under the Acts of 1917 and 1918 the appellants had become liable. Matters so continued until December 31, or shortly before December 31, 1920. The revenue authorities then discovered the omission, and on July 12, 1921, by what

they styled in each case an " Assessment Roll for year 1921," headed with the words " Amended Assessment for 1919 " and " Amended Assessment for 1920," respectively, they assessed the appellants for income tax in respect of the years 1917 and 1918. As the incomes to be assessed were those of 1917 and 1918, it would have been more intelligible, from the respondent's point of view, if they had been called Amended Assessments for 1918 and 1919. But it does not matter. In these assessments they deducted the 2 per cent. mineral tax paid in respect of the years in question, and purported to allow a deduction of 10 per cent. discount " if paid before July 20, 1921," i.e., within eight days after the assessment. There was no statutory or other ground for assigning July 20, 1921, as a date before which payment must be made to obtain a discount.

The question for decision is as to the right of the appellants to the 10 per cent. discount in respect of the taxation which had been overlooked as above stated, and for which they were assessed on July 12, 1921. They say that the relevant date for the purpose of s. 10 of the Act of 1911 is June 30, 1922. The respondent says it is June 30, 1921, although this is a date some two weeks before there was created a debt for the amount of the tax by its assessment on July 12, 1921. The question has to be decided upon ascertaining the true construction of some sections in the Taxation Acts.

The scheme of the Act of 1911 is as follows : Sect. 2 defines " income " as meaning the amount earned or received " during the twelve months ending December 31 next preceding the date of assessment." It then provides for the appointment of an assessor who is to prepare an annual assessment roll in which he is to show (see s. 7 of the Act of 1917) a description of all taxable income. His jurisdiction and his duty are confined to the income earned or received during the twelve months ending December 31 next preceding the date when he is making the assessment.

The further statement of the scheme of the Act may perhaps be most clearly made by stating it with reference to some selected year and explaining what assessment can,

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under the Acts, be made in the year selected. Take the year 1920. The assessor, who has jurisdiction and duty to assess in 1920, is to prepare a roll showing the income earned or received by the taxpayer in the year 1919. Until s. 103 of the Act (being the section upon which the question arises) is reached, he has no jurisdiction or duty as regards income of any other year. His assessment roll must be completed by November 30, 1920 (s. 81 of the Act of 1911), and its revision by the Court of Revision must ("except supplementary assessment rolls") be completed by December 21, 1920 (s. 93 of the Act of 1911).

The taxes thus assessed are due and payable on January 2, 1921 (s. 105 of the Act of 1911), and the assessor is to advertise in January, 1921, that the taxes are due (s. 110 of the Act of 1911).

The taxpayer who pays before June 30, 1921, is entitled to a discount of 10 per cent. (s. 10 of the Act of 1911). On the following December 31, 1921, the taxes, if unpaid, become "delinquent" (s. 211 of the Act of 1911), and thenceforward bear interest at 6 per cent. (s. 212 of the Act of 1911).

It will have been noticed that s. 93 had mentioned "supplementary assessment rolls." Further, s. 37 had contemplated that it might be "necessary . . . . for the assessor to make any supplementary roll during any year." And s. 82 had provided that "the assessor may from time to time, either before or after a revision of the roll, or of any separate or supplementary roll in respect of any assessment or tax," do certain things including "place thereon the amount, or balance of any amount, of tax for which any person is liable, which has not been entered in any previous roll or which has not been previously demanded." The respondent has argued that the separate or supplementary roll mentioned in these sections includes a roll which shall include not only taxation overlooked in respect of the "twelve months ending December 31 immediately preceding the date of assessment" (s. 2), but taxation overlooked in previous years. Their Lordships do not so read the Act. The definition in s. 2 dominates the situation. The assessor

acting, say, in 1920, must draw the line and include only taxation for income earned or received in 1919. If he has overlooked any income falling within that year he may, notwithstanding time expired, make a supplementary roll of income in that year, but he cannot do more.

In the present case taxation of income earned or received in 1917 and 1918 had been overlooked until December, 1920. The Act provides means for remedying the oversight. It is found in s. 103. The question is as to the construction of that section. It gives the assessor authority to make a supplementary roll for the current year, upon which he can assess and tax for the amounts omitted, but for a period limited to ten years preceding the date of such supplementary roll. At this point the Act has departed from the limit imposed by the definition in s. 2. The assessor may put upon his roll any income within the ten years. Thus in the present case he need not make one supplementary roll for 1917 and another for 1918. He might settle one supplementary roll including both years. The section styles this a "supplementary roll for the current year," but that obviously does not mean a supplementary roll for the taxation of income earned or received in the last preceding year. It is a roll altogether different. The words "for the current year" do not mean for taxation attributable to the current year, but give authority in "the current year," i.e., the year in which the assessor is acting, to make a roll in respect of income of years which are past, not current, and with which but for this section he would have no concern. An endeavour was made to give a different meaning to the expression "current year" by pointing to the initial words of s. 103, and saying that the expression must bear the same meaning in each of the two places in which it is found in the section. Their Lordships do not feel pressed with any difficulty in this respect. The word "current" necessarily speaks as at some point of time. It may in one place speak as at one point of time and in another place as at another point of time. In their opinion, the initial words mean that the revision of any roll appropriate to that year which was

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current when the assessment was made is not to be conclusive, that, although the time has expired within which an assessment roll would, under the earlier provision of the Act, be closed, there is given authority to make a supplementary roll and pick up any stitches dropped in previous years. This supplementary roll is to be a supplementary roll for the year current at the time when the assessment is made under the authority given by the section. Sect. 103, in their Lordships' judgment, is a section under which an assessment made in July, 1921, was not "attached to" (an expression used in the judgments below) nor part of, nor an enlargement of, nor an addition to the annual roll of 1920. It did not enlarge anything that was, and did not add anything that ought to have been, in the annual roll. It was altogether a separate and different roll, and is a roll not of 1920 but of 1921, the year current when it was made, and in fact it is so styled in the assessment.

The debt in respect of a tax first attaches when an assessment is made. There was no debt in respect of these taxes until July 12, 1921. Moreover, having regard to s. 6 of the Act of 1919, until the Minister had, in his discretion, fixed the allowance to be made for depreciation, there was no liquidated or ascertained sum at all attributable to the taxpayer's income.

The view thus expressed as to the meaning of s. 103 is, in their Lordships' opinion, the only possible view, having regard to ss. 104 and 105 of the Act of 1911. By s. 104 the taxes are to be deemed to be due and collected under the roll revised during the previous year, and by s. 105 are to be deemed to be due and payable on January 2 in each year. A roll cannot be revised before it is made. This roll was made in 1921. The "previous year" in the present case therefore is 1921, and the tax is therefore to be collected in 1922, and if payment was made before June 30, 1922, the taxpayer was entitled to the discount of 10 per cent.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the declaration made by the judge of first instance restored.

It is, perhaps, well to add, lest it should be thought to have been overlooked, that no reliance was placed by the respondent on the word "arrears" in s. 10, and rightly so. The taxes in question only became a debt when they were assessed. They are not "arrears" by reason of the fact that they are due in respect of income of 1917 and 1918. They become "arrears" only when December 31, 1922, has been passed, and they have become "delinquent" under s. 211.

The respondent will pay the costs of the appeal.

Solicitors for appellants: *White & Leonard.*

Solicitors for respondent: *Gard, Lyell, Bettenson & Davidson.*

[HOUSE OF LORDS.]

MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS;

AND

PROCTER . . . . . RESPONDENT.

Fatal Accident—Negligence—Evidence—Onus of Proof—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93).

The defendants owned two floating docks called the East and West Floats. A boilermaker, who was working for a contractor on a ship lying in the East Float, left the ship at 4.45 on a December afternoon to go to the latrine and was never seen alive again. There was a dense fog at the time. His way from the ship to the latrine lay southward across a piece of ground bounded on the east and west by the two floats and on the south by the waterway connecting them, and then over a bridge crossing the waterway, the latrine being at the south end of the bridge. A line of posts and chains was placed round the three sides of the land which were surrounded by water. The chains were taken down from time to time to afford access to the quay, but the dock officials had instructions to see that they were kept in position so far as practicable. The man's body was found in the West Float opposite to a point where there was a gap in the line of chains, the chain having been taken down

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* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD BUCKMASTER, and LORD CARSON.

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for the convenience of some men working on the quay and having been left down for several days. The quay side of the West Float was nearly fifty yards out of the man's proper course.

In an action by his widow under the Fatal Accidents Act, 1846, against the defendants for damages for the death of her husband :—

Held (by Viscount Cave L.C., Lord Sumner and Lord Carson; Lord Shaw of Dunfermline and Lord Buckmaster dissenting), that, in the circumstances, the failure of the defendants to keep the chain in position was not a breach of any duty owed by them to the deceased, and that the action failed.

Hardcastle v. *South Yorkshire Ry. Co.* (1859) 4 H. & N. 67 and *Walker* v. *Midland Ry. Co.* (1886) 55 L. T. 489 applied.

Semble also, on the principle of *Wakelin* v. *London and South Western Ry. Co.* (1886) 12 App. Cas. 41, assuming negligence, the trial judge was entitled to find that the plaintiff had not proved that the negligence was the cause of the death.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Branson J.

The following statement of facts is taken from the judgment of the Lord Chancellor :—

The appellants were the owners of the Birkenhead Docks, which included two large floating docks called the East and West Floats. On December 9, 1920, the respondent's husband, Albert Procter, who was a boilermaker, was working for an engineering contractor on board the steamship *City of Genoa*, then lying in the East Float. There was a dense fog during the whole of that day. At about 4.50 P.M. Procter left the *City of Genoa*, saying that he was going to the latrine, and it was understood that he would then return to his work. He was never again seen alive. On the following day his cap was found in the West Float between the bows of two ferry boats which were moored near the north-east corner of that float, and next day his body was found at the same place. His watch had stopped at five minutes past 5 o'clock.

Procter's way from his ship to the latrine lay southward across a piece of ground separating the East and West Floats, and over a bridge at the southern end called the Duke Street Bridge, the latrine being just on the other side of the bridge. This piece of ground measured about eighty-five yards from east to west and about fifty yards from north to south. It was bounded on the east and west respectively by the two

floats, and on the south by the waterway connecting them and the bridge over it. It was traversed from north to south, and slightly to the eastward of the centre of the ground, by two double lines of rails leading to and over the bridge, the rails being laid flush with the ground in granite setts, and the ground on each side of the setts being rough ground. It was said, and was not denied, that the site of the railway was used as a public highway from Seacombe to Birkenhead; and it was lighted by lamps, which were alight on the evening in question. Round three sides of this piece of ground, where it was bounded by the two floats and the waterway between them, and at a distance of about twelve feet from the dockside, there was a line of stanchions placed at intervals of about fifteen feet from one another, and chains were provided to hook to these stanchions and hang between them. Whether the chains were intended for the protection of pedestrians or only for the safety of wheeled traffic was not stated, but the latter appeared the more probable reason. The chains were often taken down to afford access to the quay, but persons employed about the docks had instructions to see that the guard chains were in position. The chain directly opposite to the place where Procter's body was found had been detached for some days, apparently for the convenience of some men who were at work on some alterations to the quay, and was curled round the stanchion, so that access to the dock from the area of land was uninterrupted at that point. Some heaps of gravel and other obstructions lay near to, but not directly in front of, the opening. The edge of the West Float was parallel to and about forty-five yards distant from the paved way and lines of rails.

The respondent, the widow of Procter, brought an action against the appellants under the Fatal Accidents Act, 1846, claiming damages on the ground that her husband's death had been caused by the appellants' negligence. The negligence alleged was that the quay was not fenced or guarded at the place where the man walked into the dock, and that no warning had been given to him of the existence of this unfenced or unguarded part of the quay, and that this unfenced

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part of the quay was in its then condition in the nature of a trap, the existence of which was known to the defendants and their servants and unknown to Procter.

The action was tried by Branson J. without a jury; and after hearing the evidence for the plaintiff he dismissed the action, stating that he was not satisfied that the omission to have the chain placed in position in the particular spot was negligence, and, further, that he was not satisfied that, even had the chain been there, the accident might not have happened. On appeal, the Court of Appeal by a majority (Bankes and Warrington L.JJ.; Atkin L.J. dissenting) held that the plaintiff had proved negligence on the part of the defendants, which had caused the death, and accordingly set aside the judgment of Branson J. and ordered a new trial.

1923. Feb. 1, 2. *Greaves Lord K.C.* and *Singleton K.C.* (*J. M. Helme* with them) for the appellants. The trial judge, after hearing the respondent's witnesses, was entitled to find that the respondent had failed to establish any negligence or breach of duty on the part of the appellants or that the deceased man was drowned through any such negligence or breach of duty, and his findings ought not to be disturbed: *Coghlan* v. *Cumberland* (1); *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (2) The duty of an occupier of premises towards an invitee is to "use reasonable care to prevent damage from unusual danger which he knows or ought to know": per Willes J. in *Indermaur* v. *Dames.* (3) But, first, the duty is limited to those places to which a person may reasonably be supposed to be likely to go in the belief, reasonably entertained, that he is invited or entitled to do so: *Walker* v. *Midland Ry. Co.* (4); and, secondly, in considering the meaning of "unusual danger" the question is not whether the danger is unusual with regard to all the world but whether it is unusual with regard to the particular complainant: per Phillimore L.J. in *Norman* v. *Great Western Ry. Co.* (5)

(1) [1898] 1 Ch. 704.
(2) [1915] A. C. 217.
(3) (1866) L. R. 1 C. P. 274, 288; affirmed (1867) L. R. 2 C. P. 311.
(4) 55 L. T. 489, 490; 2 Times L. R. 450, 451.
(5) [1915] 1 K. B. 584, 596.

Here there was no invitation, express or implied, to the deceased man to go to the quay side of the West Float, and, further, the trial judge had before him evidence upon which he could find, as he did, that the absence of the chain was not an unusual danger to this man, inasmuch as it was known to those working about the docks that no reliance could be placed upon the chain being in position at any particular time. There being here no invitation and no unusual danger, there was no evidence of any breach of duty on the part of the appellants: *Gautret* v. *Egerton*. (1) [They also referred to *Wilkinson* v. *Fairrie* (2) and to the comment thereon in Halsbury's Laws of England, vol. xxi., p. 390.]

Merriman K.C. (with him *Madden K.C.* and *J. W. Morris*) for the respondent. A finding of fact by a judge of the High Court does not stand on the same footing as a finding by a jury, and, where the question depends, not upon the credibility of the witnesses, but upon the proper inference to be drawn from admitted facts, the original tribunal is in no better position than the appellate tribunal: *Montgomerie & Co.* v. *Wallace-James* (3); *Dominion Trust Co.* v. *New York Life Insurance Co.* (4) The question whether the deceased man was invited to this particular spot on the docks is not the question to be determined, otherwise *Indermaur* v. *Dames* (5) would not have been decided as it was. *Dickson* v. *J. A. Scott, Ld.* (6) also deals with this point. A reasonable latitude must be allowed. Having regard to the position of the chains and to the fact that the deceased man was a workman having work to do on the docks, so long as he kept within the chains he was within the area of the invitation. The test of whether or not he was within the area of invitation and the question whether he was guilty of contributory negligence are for the purposes of this case one and the same. The duty of the appellants was to guard against any mistake which a man might naturally make. This is implied in the

(1) (1867) L. R. 2 C. P. 371, 375.
(2) (1862) 1 H. & C. 633.
(3) [1904] A. C. 73, 75.
(4) [1919] A. C. 254.
(5) L. R. 1 C. P. 274, 288; L. R. 2 C. P. 311.
(6) (1914) 30 Times L. R. 256.

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passage quoted by the appellants from the judgment of Lord Selborne in *Walker* v. *Midland Ry. Co.* (1) The deceased man knew that the appellants took upon themselves the duty of keeping a complete line of chains around the promontory. That being so, he might reasonably anticipate that if he went wrong he would be pulled up by a chain, and by neglecting the usual precaution of seeing that the chain was in position the appellants misled him: *Smith* v. *South Eastern Ry. Co.* (2) Even if the deceased man was a licensee only the respondent is still entitled to succeed, because it was the duty of the appellants not to lay a trap for him: *Bolch* v. *Smith* (3); *Corby* v. *Hill.* (4)

Greaves Lord K.C. in reply, on the question of the limits of the invitation, cited *Hardcastle* v. *South Yorkshire Ry. Co.* (5) and *Binks* v. *South Yorkshire Ry. Co.* (6)

The House took time for consideration.

1923. March 13. VISCOUNT CAVE L.C. My Lords, this is an appeal from an order of the Court of Appeal in England setting aside a judgment of Branson J. and ordering a new trial. [His Lordship stated the facts and continued:] My Lords, it was contended on behalf of the appellants that the finding of Branson J., being a finding of a trial judge on a question of fact, should not have been disturbed by the Court of Appeal. In my opinion there is no ground for such a contention. The duty of a Court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley M.R. in *Coghlan* v. *Cumberland* (7), and by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James* (8), and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up

(1) 55 L. T. 489, 490; 2 Times L. R. 450, 451.
(2) [1896] 1 Q. B. 178, 183.
(3) (1862) 7 H. & N. 736, 742; 31 L. J. (Ex.) 201.
(4) (1858) 4 C. B. (N. S.) 556, 567.
(5) 28 L. J. (Ex.) 139, 141; 4 H. & N. 67, 74.
(6) (1862) 3 B. & S. 244.
(7) [1898] 1 Ch. 704.
(8) [1904] A. C. 73.

its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them.

The respondent's case is rested on the well-established principle that where a landowner invites or induces a person to go upon his land, not as a bare licensee but for some purpose in which both have an interest, he must make reasonable provision for that person's safety. This rule was clearly stated in the judgment of Willes J. in *Indermaur* v. *Dames* (1), where that learned judge summed up the law as follows:—

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

In the present case it is not disputed that the deceased man came within the class described by Willes J. He came upon the dock property and passed to and from the vessel where he was engaged upon business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company

(1) L. R. 1 C. P. 274, 288; affirmed L. R. 2 C. P. 311.

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should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him. If so, the questions of fact which arise or may arise are three—namely, (1.) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased ? (2.) If so, was their negligence or want of care the cause of his death ? and (3.) Was there any contributory negligence or want of reasonable care on his part for his own safety ?

In dealing with the first question, it is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation ; and this duty must be limited, as Lord Selborne pointed out in *Walker* v. *Midland Ry. Co.* (1), to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so. If this test is applied, it appears to me that there was no breach of duty on the part of the appellants. The deceased was not invited or entitled to go to the quayside of the West Float ; he had no business there, and it was nearly fifty yards away from his proper route to and from his ship. Nor could the dock company be expected to foresee that he would wander so far from his way, even in a fog, and to provide for his safety in so doing. If it be the fact that he lost all sense of direction in the fog and, missing the rails and lamps which would have guided him to the bridge, and not seeing any of the obstacles lying about the area of ground or even the stanchions on each side of the space from which the chain had been removed, walked straight through this narrow opening into the dock, this was an extraordinary mischance which no one could be expected to foretell or provide for ; and I do not think that the failure of the company to do so argues any want of reasonable care on their part.

It is said that whatever may be the case in other dockyards,

(1) 55 L. T. 489, 490.

where the docks are generally left unfenced, the fact that in this case the area over which the deceased had to pass was in fact protected by chains, makes a difference, and accordingly that he was entitled to expect that the chains would remain up; and the "trap" cases are referred to. In my opinion the principle of those decisions has no application to this case. When a person is invited or licensed to pass by a particular way, and the landowner without warning to him does something which makes it dangerous for him to use that way, liability may no doubt be incurred. But this is because the use of the permitted way itself is subjected to an unknown and unexpected danger; and where, as here, the danger zone is far removed from the permitted way, the same considerations do not apply. To say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for that person would appear to me to be a strange use of language. In *Hardcastle* v. *South Yorkshire Ry. Co.* (1), where a man had wandered from a highway and had fallen into a reservoir on land at some little distance from the highway, the Court held the owner of the land not liable; and Pollock C.B. made the following observations:—

"When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not."

(1) 4 H. & N. 67, 74.

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It is true that these observations had reference to a public way, but the reasoning appears to me to apply equally to a way which a person is invited or permitted to use.

The result is that in my opinion no negligence on the part of the company was proved; and if so, the other questions do not arise. But I think it right to add that, even if negligence by the company be assumed, I do not consider it proved that their negligence was the cause of the accident. No doubt it is a probable surmise that the deceased man lost his way in the fog, and unhappily missing all the signs which would have shown him his mistake, and either not knowing of or not remembering the gap in the chains, walked straight through it into the dock. But the Court does not deal with surmises, but with proofs; and the known facts are equally consistent with the view that, knowing that he had left the line of rails and lamps and had got on to soft ground, he failed to take reasonable pains to regain a place of safety, and so lost his life by his own imprudence, or with the view that, knowing of the gap in the chains (which he must have seen twice a day at least for several days before the accident), he purposely passed through it intending to speak to some one on the ferry boats and stumbled into the dock. Of course, neither of these hypotheses is proved, but neither is excluded by the evidence; and it is for a plaintiff who alleges that loss has been caused by the defendant's fault to establish that case beyond reasonable doubt. Upon this point *Wakelin* v. *London and South Western Ry. Co.* (1) is directly in point. In that case a widow sued a railway company under the Fatal Accidents Act, 1846, for damages for negligence causing her husband's death; and it was proved that the dead body of the man was found on the railway line near a level crossing not guarded by a watchman, and that the man had been killed at night by a train which carried the usual headlights, but did not whistle or otherwise give warning of its approach. On these facts this House, affirming the Court of Appeal, held that, assuming (but without deciding) that there was negligence on the part of the company, there was

(1) 12 App. Cas. 41, 44.

no evidence to connect the negligence with the accident, and accordingly that there was no evidence to go to the jury. Halsbury L.C. stated the principle as follows :—

"It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: 'Ei qui affirmat non ei qui negat incumbit probatio.'" Similar expressions are to be found in the judgments of the Court of Appeal in *Norman* v. *Great Western Ry. Co.* (1), and I think that they apply with great force to the present case.

It is impossible not to feel compassion for the respondent in her loss; but she has undertaken to prove that the appellants are responsible for it, and in my opinion she has failed to do so. This being so, I am compelled to hold that this appeal should succeed, and I move your Lordships that the order of the Court of Appeal be set aside and the order of Branson J. restored; but as the respondent has been a great sufferer, and in view of the differences of opinion in the Court of Appeal and (as I understand) in this House, I would propose to your Lordships that there should be no costs of the proceedings in the Court of Appeal or in this House.

LORD SHAW OF DUNFERMLINE. My Lords, I am so entirely satisfied with the judgments pronounced in this case by the learned Bankes and Warrington L.JJ. that I could be well content to adopt these opinions without presuming to add anything thereto. In view, however, of the difference of view

(1) [1915] 1 K. B. 584.

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in your Lordships' House, I may be permitted as briefly as possible to put the case in my own way.

The action is founded upon negligence, and negligence must be proved. It is raised by the widow of a boilermaker, who met his death in the circumstances described, and whose position on the dockside was that of an invitee. He was in the service of engineering contractors on board the steamship *City of Genoa*, then lying in the East Float of Birkenhead, one of the appellants' docks. He had been for some weeks engaged on that job, and he had the right, of course, to reach it from Birkenhead, proceeding over a promontory in the form of a parallelogram which was surrounded on three sides by water.

The accident occurred during his working hours, which lasted till 7.30 in the evening. He left the ship to proceed to a latrine, the workmen not being permitted to use the latrine accommodation on board. While so proceeding, he went over the dockside and was drowned. He entered the shed and made his exit from the door of that for five or six yards by the aid of lamplight. His correct course was to have sheered to the left at an angle of about 75 degrees. The night, however, was very dark and there was a fog so thick as to prevent one even seeing one's own hand. Such lamps as there were shed only light to a distance of five or six yards; the rest of the parallelogram was shrouded in fog.

To approach the question of negligence it is necessary to consider what was the duty of the defendants, the Dock Board, with regard to that piece of ground. That they had a duty, and were properly conscious of that, is, I think, beyond question. The three sides, in so far as these abutted on the water, were protected by posts with chains slung between them. As the square was used in part as a thoroughfare both for pedestrian and vehicular traffic, this precaution taken by the Board is not to be wondered at. I should not be prepared, however, without further argument to affirm that the Board were bound to fence that square. The open face of docks in such neighbourhoods is familiar to all inhabitants. It may, of course, be, that a square of

this description, having to be crossed and recrossed by men working on ships under repair in all weathers and by day and night, involved as a necessity that precaution which the Board properly took. But, as I say, it is not necessary to pronounce upon that in the abstract.

The case, however, that comes before the House is a different and very distinct case—namely, that of a square open on three sides to a water danger and fenced therefrom as a matter of general precaution, but negligently left unfenced in circumstances of extreme and exceptional peril. In my opinion, the leaving of a part of the fencing open was in itself the creation of a danger of a very serious kind. In a dark and foggy night a passenger across the square reaching the chain is by that guided to the point of safety where he can cross the bridge. To remove that guidance and to leave a gap through which the passenger may step on to and over the dockside into deep water and be drowned is a negligent omission for which the Dock Board is responsible.

A satisfactory feature of this case is that the appellants seem thoroughly to have realized that fact themselves. Their prescriptions by regulation appear in these proceedings. On the subject of keeping the guard chains in order interrogatories addressed to the Dock Board are produced in answer to a question as to what precautions are taken. The answer is as follows—namely: "There are no special precautions taken by the Board's officials in foggy weather beyond seeing, as far as is reasonably possible, that the guard chains are all in position."

In response to a question as to whether there are any regulations or instructions issued by the appellants in reference to the protection of the quay in foggy weather: The answer is: "The guard chains and stanchions at the North East corner of the West Float on December 9 last were under the control of the Pier Master in charge. There are no written regulations defining whose duty it is to remove and replace guard chains. If the chains are removed by any one it is his duty to replace them, or to see that they are replaced. Further, the officials of the Harbour Master's Department

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and the Police have instructions to see, as far as practicable, that the guard chains are in position and to replace any which happen to be out of position."

Then, my Lords, there come certain entries which come near to the circumstances of the present case. A circular from the harbour master, dated January 26, 1912, is printed. It is as follows: "Guard chains.—The Board having recently settled a claim for personal injuries, etc., caused through the breaking of a guard chain upon which a man was sitting and which had been tied up temporarily with a piece of cord, I have to direct that strict attention be given to the following instructions on the subject of guard chains generally: (1.) The working-dock-man must examine daily all guard chains and afterwards record in the shed book particulars of any guard chains broken or otherwise out of order. (2.) In the event of guard chains or hooks being found broken, immediately send word to the Foreman Scuttler, who will have repairs effected without delay, and report the matter to me in due course."

Still further, and almost directly bearing upon the issue of the present appeal, there is a copy of the head constable's order: "It seems that there is some misunderstanding about the duty of the Police in the matter of the guard chains at the Docks. Although it is not their duty to go round their beats for the purpose of putting them up, it certainly is their duty to put up any chain which they may find down without necessity when there is the least chance that its being left down is a source of danger."

It appears to me to be demonstrated by these citations that the appellants, having placed chains in position, were alive to the peril of not keeping them in position, and were anxious to recognize as a matter of duty the replacement of the chains whenever a particular purpose of removal was ended, and the making of a report of accurate replacement and of all being in order. My Lords, I do not accordingly have any difficulty in finding that a violation of these orders involves negligence, nor is there any doubt in the present case as to such a violation having occurred. One of the chains

was removed, it was wrapped round the adjoining post, and knotted; the gap thus left was left for days, the knotted chain beginning to rust. All that is clearly proved: the orders and precautions on the regulations and orders had been violated. I think this clearly points to negligence. I think the learned dissenting judge, Atkin L.J., was right when he said: "Whether or not it is their duty to have some means of protection, I think that their legal duty is altered when once they do take upon themselves the position of protecting the approach to the water, because under those circumstances they do allow a person who knows the position to rely upon that protection being there in the circumstances in which it ought usually to be there."

In my opinion these propositions are sound in law.

This induces me to refer at this stage to a notable circumstance in connection with the judgments of the Court below. The learned Branson J., and also, I incline to think, Atkin L.J., are not satisfied that Procter walked through the gap referred to and so met his death. I do not gather that there is any difference of opinion among your Lordships on this point. His cap, and afterwards his body, were found in the water immediately opposite the gap. There is no suggestion that he got to the dockside by any other access or that there was any current in the water which would have made his body drift to the point where it was found. Of course, my Lords, it follows, however, that if a judge holds it not to be sufficiently proved that the deceased went through the gap, the rest of the case suggesting negligence is mere surplusage. I incline to the opinion that, if the learned judges to whom I have referred had been satisfied, as your Lordships are, on this vital point, they might not have come to the opinion which they reached. In any event it is pretty clear that Branson J. would not, as he did, have stopped the case at the end of the plaintiff's evidence. An outstanding feature of the case is the precautions demanded even under the rules of the dock for seeing that the chains were up, but if the learned judge was not satisfied that the deceased passed where a chain was down, then from that point of view he need

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have gone no further. The whole of this case, unfortunately, is thus subject to that judicial mischance. Had the case proceeded to its natural termination and the dock authorities had been asked to explain the rule, the necessity for it, the history of the absence of chains when they should have been there and so on, no doubt the position of this gap which turned it into a trap might have been most completely verified. All that we have is that the Dock Board was scrupulous as to having the chains always up because of one previous accident which is put on record. How many more accidents there were caused by the condition of the chains, we do not know, or whether there were any. But the whole of that inquiry has been excluded mainly, though not entirely, because the judge who tried the case saw no necessary connection between the gap and the death. In these circumstances I incline to the opinion that it would be a complete failure of the law to reach a remedy for a wrong or to ascertain whether a wrong was committed to keep back the case from full investigation. A legal problem of complexity, however, remains—namely, let it be assumed that Procter, the deceased man, was an invitee, did the duty of the Board extend to that particular man? Although keeping on to the square he had proceeded in the fog and darkness off his route. When he did so, it is urged, he lost the status of a person to whom the Dock Board owed a duty and his rights were not those of an invitee, but at the most that of a bare licensee, if so much.

The refinements of distinctions between these categories are notorious, and one general rule as laid down by Lord Esher M.R. may be said to apply to both. In *Thatcher* v. *Great Western Ry.* (1) Lord Esher puts it thus: "If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former." That would apply to both categories. In *Holmes* v. *North Eastern Ry. Co.* (2) the discrimination between the position of

(1) (1893) 10 Times L. R. 13.
(2) (1869) L. R. 4 Ex. 254, 259; affirmed (1871) L. R. 6 Ex. 123.

a licensee from a person present on certain premises to whom the occupant has a duty to take care, is thus expressed by Cleasby B., "as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." And so in *Smith* v. *London and St. Katharine Docks Co.* (1) the company was held liable, they being the owners of docks, who provided access to vessels by means of gangways over. To quote Bovill C.J., "the gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it."

In my opinion, (1.) the appellants were bound to provide a reasonably safe access and exit across the square of land in question for workmen employed at the docks; (2.) the workmen so employed were entitled to consider the square as fenced by posts and swing chains and may be taken to have known or properly assumed that this was so; and (3.) the removal of the chains constituted a trap into which, unfortunately, the deceased was led and so met his death.

It is now necessary to see exactly what the deceased did. Having emerged from the shed adjoining the ship where he was working, he advanced a few paces by the light of a lamp and then sheered to the left. All this was right, but instead of sheering at an angle of 75 degrees and walking on admitting no impediment and being safe, he sheered only at an angle of 45 degrees and walked on and met no impediment and was drowned. Branson J. says: "Now that shows that all the surroundings and the approaches to this place where the chain was down were, one might say, almost completely guarded by the obstructions which were put there. The opening which was left was a small one, and, so far as the evidence goes, there is no evidence to show that those persons who had the authority of the Board on the spot had any reason to expect that anybody would come along blundering in among those dumps of material in such a way as to cause

(1) (1868) L. R. 3 C. P. 326, 332.

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the chains being down to constitute any risk that anybody would come to mischief."

My Lords, this in no way represents the actual state of matters with regard to the unchained gap. It appears clearly from the evidence, to use the language employed by the witness Forsyth: "You could walk straight from Hall Shed to where the body was found without meeting any incumbrance whatever." Had the chain been on he would not have been drowned; he would have been guided to safety. He was not guilty of contributory negligence; that is not suggested. The ambit, accordingly in my opinion, of the responsibility in such cases extends on the part of the Dock Commission to all invitees legitimately on the ground: "as soon as you introduce the element of business, which has its exigencies and necessities." The route from the ship, all on dock ground, in this case seems to be entirely the opposite of that put by Bowen L.J. in *Thomas* v. *Quartermaine* (1), "where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all." The circumstances of the present case are that the danger was not visible; that the risk was not appreciated; that the injured person did not know or appreciate either, and did not voluntarily encounter either; that there was no absence of act of omission, but that on the contrary it was a further act of omission, the permitting the chain to remain removed, that constituted the negligence and caused the death.

My Lords, I cannot refrain, in connection with the general doctrine of liability involved in such a case as the present, from showing how far the law has gone, even in regard to bare licensees. In *Gallagher* v. *Humphrey* (2) Cockburn C.J. says: "A person who merely gives permission to pass and repass along his close is not bound to do more than allow the

(1) (1887) 18 Q. B. D. 685, 697. (2) (1862) 6 L. T. 684, 685.

enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger." The latter portion of this passage, which may be held as applying not only to invitees but even to licensees, seems clearly to point to liability in such a case as the present.

This authority, coupled with *Indermaur* v. *Dames* (1) and numerous other authorities (their number in this branch of the law is legion), appears to me amply to confirm the judgment of the majority of the learned judges in the Court of Appeal. I cannot doubt that any other decision will be accompanied with practical danger in results, and I highly deprecate what, in my humble opinion, would be the mischance to which I have referred, in which the learned judge, having stopped the case and given a decision, had, in an important element in deciding on such a course, taken a mistaken view of one of the fundamental facts of the case. In my view that mischance should be rectified, and the case should be fully tried.

LORD SUMNER. My Lords, it is common ground that the deceased, while at work on the *City of Genoa*, was an "invitee" of the Dock Board, for, as undertakers, the Board desires and is bound to admit ships to the docks, and that involves the admission also of persons, whom the shipowners

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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or their contractors engage to work upon the ships. It is also common ground that the expression "while at work" involves a certain margin and includes going to and coming from the ship for the purposes of the employment, and also going to and coming from the latrines, provided by the Board for such persons. This is common sense and, not having been in dispute, calls for no further comment. It may be, however, that the use of the public highway, which crosses the dock property, is no part of this invitation, but that the workman, even when using it for the purposes above-mentioned, does so merely as one of the public. The point need not be decided.

I think the very idea of an invitation to come upon the Board's premises, considering their character and extent, connotes some local limit within them. A free range over the whole estate is not given to every invited workman. The respondent, recognizing this, suggested two forms of limitation—the first, that the line of the stanchions and chains formed that limit; the second, that the limit varied according as the day was clear or foggy. As to the first, there is no evidence that the stanchions and chains were put up with any such purpose and, as a fact, I am sure they were not. As to the second, it amounts to this, that a man, who can see where he is going, enjoys the rights of an invitee within modest boundaries; but a man, who cannot, carries them with him as far as the limits of his actual error. Both suggestions are ingenious, but they are suggestions ad hoc. There is no decision to support them. The observations of Neville J. in *Carshalton Urban Council* v. *Burrage* (1) are the nearest that I can find, but they are directed to s. 30 of the Public Health Acts Amendment Act, 1907, while, in general, what is said in the *Hardcastle Case* (2) is much to the contrary.

The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none. The common interest here is that ships in the

(1) [1911] 2 Ch. 133, 138. (2) 4 H. & N. 67, 74.

docks should, when necessary, be able to employ boilermakers on board of them. In the other case, the licensee has an individual interest in being allowed to pass, while the licensor, the leave being gratuitous, has no interest in the matter at all, so long as the licensee does not get into trouble or into mischief. I cannot see what common interest between the Board and the deceased is involved in his expatiating at will over the open ground between the East and West Floats. He was indeed at liberty to cross it to Gee's Dining Room, but we know that he was not going there and never did go there. The common interest, involved in his being able to do his work in comfort, extended to his visiting the latrine, but he was not actually visiting the latrine on this occasion, though he was probably trying to do so. He was actually going where he had no business to go at the time of the accident, though his mistake was alike innocent and accidental. How can a workman extend the Board's liabilities, indicated by this term "invitation," by making a mistake of his own and getting lost in a fog? What legal reason can there be for the Board's "inviting" him to go somewhere in a fog, where he does not want to go at all and would certainly not be invited to go in clear weather, and where, moreover, the Board has no interest or desire to invite him at any time? There is none: the suggestion is a mere impulse of compassion.

There is no question here of nuisance to a highway or of a specific obligation, general or particular, to erect and maintain fences. The place where the deceased's body was found was in no sense adjoining the highway. No statutory obligation to erect or maintain the stanchions and chains was referred to, and they may have been erected for many other purposes than that of preventing people from falling into the water in the dark: see the elaborate survey of the cases by Farwell L.J. in *Latham* v. *R. Johnson and Nephew, Ld.* (1)

If, then, the deceased's position was at best that of a licensee, what duty did the Board owe to him? What is charged against the Board is a pure act of omission—namely,

(1) [1913] 1 K. B. 398.

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an omission to put up the chain. What the plaintiff must show is a duty towards her late husband to put it up or keep it up and an injury to him caused by the omission. To say that the Board provided chains, and made regulations under which this chain ought to have been put up but omitted to have it replaced, in circumstances involving danger to the deceased, constitutes no cause of action by English law, unless a duty to the deceased can be made out upon grounds of law and not a mere failure to do what would have made things safer, if done.

A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

What were the facts? The deceased was a sober, experienced workman in the prime of life, not shown to have been unobservant or lacking in self-possession. He was an inhabitant of Birkenhead, constantly employed within the area of the docks, and he had actually been in regular employment on the *City of Genoa* for the previous fortnight. On leaving the shed to go, as he said, to the latrine, he found himself in a dense fog after dark. A fog, I take to be the typical case of a fortuitous but expected hazard, in which every one must, and knows that he must, walk warily.

Especially is this so when, as the man knew, the water of the dock lay within from 100 to 300 feet on three sides of him. As his fellow-workmen say, you must then be very careful; as they say also, the way to the bridge, for which he had to make, could be found by noting the run of the railway lines underfoot, the character of the paving and the sound made by footsteps upon it. Within thirty or forty feet of the shed door the deceased must have crossed eight, if not twelve rails, but, instead of following the line of them, he crossed the special paving of the railroad tracks and the marginal paving beyond and got on to rough macadamized ground. He must also have got away from the lamps, which, if he had followed the rails, would at short intervals have become visible. It seems to me that a reasonable man, so circumstanced, could not have failed to know, before he had got halfway to the West Float, that he was lost in the near neighbourhood of deep water.

In these circumstances what did it behove him to do as a reasonable man, and by what reasonable course on his part is the Board entitled to have the measure of its duty fixed? This is not a question of charging the deceased personally with contributory negligence. The question is, what was to be expected in such circumstances by the deceased on the one hand and by the Dock Board on the other?

It behoved the deceased at once to take stock of his position. I say nothing of the possibility of calling out to find out the direction of persons on the roadway or of trying back to strike the rails, which he had so recently left. I think that he should have said to himself, that the quays, which were steep-to and had deep water against them, were a pressing danger to a man, who could not see where they were. True there were the posts and chains, but he must have known, as his mates knew, that they were often let down, and indeed are made detachable for that very purpose, and that, having been let down by stevedores and others not in the Board's employment, as well as, though less frequently, by the Board's own servants, it is in the ordinary course of human nature that they should often be left as they lie and

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not be replaced, until one of the Board's servants finds time to put them up again. As Willes J. observes, a trap means something like a fraud. Now, though the Board may have represented, that when the chains were taken down they would be replaced as soon as possible, it never represented by word or deed that the chains would not be down at any time or at all, or that they actually were in position at the time in question. It is not to the point to say that the deceased had a right under the Regulations (if indeed he knew anything about them) to contend that the chains ought to be replaced at once, for a licensee cannot be heard to contend that an actual danger, of which he knows, is a danger that is concealed from him, because it arises from somebody's neglect of his duty. "Omnia præsumuntur rite esse acta" has no application here. Neither is this a case of a person, who has an absolute right of user, seeking his remedy for the infringement of it by another, who has neglected to observe his duty not to infringe. If the gap may probably be there and the wanderer knows it, the knowledge is none the less knowledge, because there ought not to be any gap at all. On the other hand the possibility, that a man could fortuitously make his way through such an entanglement of obstructions without being brought up by the fullest warning, seems to me so remote a contingency, that I much doubt, if any practical man of whatever class would have expected the Board's servants to be on their guard against it, if the accident, which resulted in this case, had not been a fatal one.

Concealed dangers, as the term shows, are relative to the knowledge and the capacity of the person who suffers by them, and in this matter he must use his knowledge and his good sense reasonably and must act accordingly: see per Lord Atkinson in *Cooke* v. *Midland Great Western Ry. of Ireland.* (1) What must the deceased be taken to have known? He was no child. He knew that the fog prevented him from using the sense of sight for his protection. From his senses of feeling and of hearing he had the means of knowing that he had got beyond the road leading to the bridge.

(1) [1909] A. C. 229, 238.

He knew that the chains were his only protection from the water, towards which he might quite probably be going, and he knew that they were sometimes properly put down and sometimes were left down, though improperly. If he did not know what work was going on at the quay and the West Float, he knew that chains might be down in connection with any ships that might be lying there: if he did, he knew that they might be down in connection with the construction work that was actually going on, as indeed proved to be the case. If knowing the risk, he elected to go on and chance it, "volenti non fit injuria." He might have elected to try back. It is said that the effect of fog is so bewildering, that one loses all sense of direction. I rather think that varies a good deal with the man, the fog, and the nature of the ground, but let it be so; he might still have advanced step by step, feeling the ground before him with his foot before committing himself beyond the power of recall. The ground near the line of chains was littered with materials of various kinds, and, if we are to infer what is probable from evidence of what is certain, we ought to infer that the deceased more probably struck upon some of these obstructions than that he somehow cleared them all, and, if he did so, he ought reasonably to have inferred either that he was getting near the line of chains, supposing that he knew what work was going on, or, supposing that he did not, then that he had got on to ground in a condition wholly unusual and strange, and had better sit down and wait or shout for direction than go striding on, confident that, wherever he was and wherever he went, there would be a chain in position to keep him safe.

Evidence was given to show that this chain had been down for some days. This rather goes to increase the probability that a prudent workman would not rely on a chain always remaining in position or always being promptly replaced, but, for the rest, I think it is irrelevant under the circumstances of this case. If the Board is liable, it is liable because the chain was not up at the time when the deceased approached the edge of the quay. The Board is none the more liable to his widow because the chains were not up

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when he was not there, and none the more, whether the omission to put it up was long or short.

My conclusion is that there was no trap, because in the deceased's place a reasonable man would have known that, such as it was, the danger was one to be reckoned with. That the odds were against the deceased's hitting off the precise gap in the line of chains no more helps the respondent than it does the appellants. The danger was one, of which a reasonable man had expectation or notice sufficient to have enabled him to avoid any evil consequences arising from it. I do not think it necessary to go through the cases, for the principle involved is familiar and only the application is contentious, but I think Lord Selborne's reasoning in *Walker* v. *Midland Ry. Co.* (1) strongly supports the above conclusions. I would like to add that, if I have not dwelt on the melancholy circumstances of this accident, it is not that I am not sincerely sorry for the widow or that I mean in any way to blame the deceased, but merely that, in a question of law, which is not without its difficulties, I only find myself embarrassed by considerations distressing in themselves, which every lawyer knows to be logically irrelevant.

My Lords, Branson J. was not satisfied that the deceased met his death because the chain was down. We need not consider whether this conclusion should be left undisturbed. I agree that the question is open to review, nor should I go further than to say that, if the learned trial judge declared that the plaintiff's evidence did not satisfy him of a conclusion essential to be proved by the plaintiff, I should give earnest consideration to his doubt before adopting an opposite conclusion. I think, however, that in justice to him it is worth while to recall how little we actually know in this case, as distinguished from what we may conjecture. The deceased told two men that he was going to the latrine ; why he did so I cannot imagine, since it was none of their business. He was lost in the fog, and was not seen alive again. Whether he had any further purpose ; whether he relieved himself in the

(1) 2 Times L. R. 450 ; 55 L. T. 489.

darkness on finding that he had missed his way, and then went on for some unknown, though not impossible, reason of his own; whether he passed through the gap unconscious of being in the line of the chains at all, or was near enough to either stanchion to know where he had got to, but proceeded, thinking that he had now got his bearings again; whether he fell into the water in trying to follow the line of stone paving along the quay edge, or because he had no idea how near the water was; whether he ever caught sight of either of the lamps, which would lie near his route, if he went straight from the shed door to the quay—these and many other such things are beyond our knowledge. I doubt if one view of any one of them is really more probable than another. It is not a case of the accident speaking for itself. The chains are about twelve feet from the water's edge. The gap in the chains and the fall into the water, at least twelve feet—four or five strides—beyond it, have to be causally connected by just inference from the plaintiff's evidence, and, for my part, I am not surprised that the learned judge was not satisfied that this connection was made out.

My Lords, I should allow the appeal.

LORD BUCKMASTER (read by LORD SHAW OF DUNFERMLINE). My Lords, I am unable to agree with the view expressed by Branson J. and by Atkin L.J. that it is a pure conjecture as to the way in which Albert Procter met his death on December 9, 1920. I think the circumstances established by the evidence are sufficient to warrant the reasonable inference that the disaster arose by his walking across the quay for a perfectly legitimate purpose, missing his way in the fog, and passing through the gap where the chains were down that fenced the quay from the water. Upon this view the Court of Appeal are unanimous that liability would be established, and the question is whether the appellant has succeeded in showing that they were wrong. I do not think he has.

I refer, for the purpose of this opinion, to the statement made by Lord Selborne in the case of *Walker* v. *Midland*

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Ry. Co. (1) It is the nearest case in point, and the guiding principle laid down must be accepted. In that case, as in this, the accident occurred to a man lawfully upon the premises by invitation.

The facts were these: a guest at an hotel in search of a lavatory at night entered a room, and fell down the well of a service lift. Lord Selborne stated the duty of the hotel proprietors in these words: "The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so." In the present instance, there was a dense fog. The distance from the shed to the place where Procter fell into the water is in a straight line about eighty-five yards, and away from the place to which he was going. The difficulty is in determining what are the limits of the area within which a man might reasonably be expected to be in such a spot as this quay during a dense fog. It is impossible to reconstruct in the light all that may happen in the darkness. I recognize that Procter must have crossed the rails and that if these were once crossed on the western side he was off his track, but in the fog every sense is obscured, and I find it difficult to believe that a man must necessarily have known that he crossed the rails at the point opposite the shed, or, even if he did, that it was easy for him to get back, or that it was unreasonable to expect in the circumstances that he might wander where he did.

In these cases it must always be a matter of degree. Had the quay been narrower so that the water was nearer to the railway, there would, I apprehend, be little doubt of the liability of the defendants. The actual distance does not seem to me so great as to affect their liability. The matter is one of considerable difficulty, but I should have answered the question put by Lord Selborne in favour of the respondent, and I am fortified in this opinion by the knowledge that that also is the view of the members of the Court of Appeal.

(1) 55 L. T. 489, 490; 2 Times L. R. 450.

LORD CARSON. My Lords, I am of opinion that this appeal should be allowed.

The principle of law applicable is clearly laid down by Lord Selborne in the case of *Walker* v. *Midland Ry. Co.* (1) already referred to. "This is not a question of any 'act' done by the respondents; it is one of alleged neglect or default. Wrongful neglect or default there could not be, unless a duty, which was not performed, was previously owing by the respondents towards the plaintiff's husband, or towards persons in the same situation, in respect of the place where the accident happened." In the present case I can find no such duty. It was not contended that the defendants were under any obligation to erect or maintain fences round the dock, but it is argued that having erected the stanchions and the chains the absence of the chain in this particular place constituted an unusual danger and was quoad the deceased something in the nature of a trap. In other words, as I understand the argument it amounts to this, that the deceased being employed on a ship lying in the East Float at Birkenhead, finding himself involved in a fog and losing his way, was reasonably entitled to assume, and did assume, that the chains everywhere attached to the stanchions would be in their proper places, and that he could therefore proceed to wander over the locus in quo with the expectation of finding such chains as a protection from falling into the water. As regards the appellants, on the other hand, the question I think is, ought they reasonably to have anticipated that a man or men working in the East Dock, as the deceased was, might, if a fog arose, take the risk of wandering over the promontory under a reasonable belief that he or they could rely upon the chains affording him or them protection? My Lords, I so entirely agree with Lord Sumner in his analysis of the facts so far as we know them, and of the tests to be applied in forming a judgment on the question of reasonableness, that I think it is unnecessary for me to attempt to recapitulate them. In the words of the noble Lord, "My conclusion is that there was no trap, because in the deceased's

(1) 55 L. T. 489, 490; 2 Times L. R. 450.

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place a reasonable man would have known that, such as it was, the danger was one to be reckoned with."

My Lords, I should like also to express my concurrence with the views expressed by Atkin L.J. on the finding of Branson J. that he was not satisfied that the deceased met his death because the chain was down.

My Lords, I do not doubt that this House has the right to find the fact proved which the learned judge thought was not proved, but in a case such as this where so little is proved and so much is left to conjecture, I cannot but think that the conclusion of the judge was justified and reasonable, and I should certainly be very slow to reverse it unless I had a very clear conviction in my own mind, which I have not, that the fact was satisfactorily proved.

Order of the Court of Appeal reversed and order of Branson J. restored. Each party to pay their own costs in the Court of Appeal and also the costs in respect of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 13, 1923.

Solicitors for the appellants: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for the respondent: *Helder, Roberts, Giles & Co., for J. A. Behn, Liverpool.*

[HOUSE OF LORDS.]

MERLIMAU RUBBER ESTATES, LIMITED . . . . . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

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1923
March 22.

Revenue—Excess Profits Duty—Percentage Standard of Pre-war Profits—Ascertainment of Capital—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 40, sub-s. 2; Sch. IV., Part III., r. 1 (a) and (c).

In assessing a rubber company to excess profits duty the pre-war standard of profits was taken to be the percentage standard under s. 40, sub-s. 2, of the Finance (No. 2) Act, 1915, which provided that the Third Part of the Fourth Schedule should have effect with respect to the ascertainment of capital for the purposes of that part of the Act. By r. 1 of Part III. of the Fourth Schedule "the amount of capital of a trade or business shall, so far as it does not consist of money, be taken to be—(*a*) so far as it consists of assets acquired by purchase, the price at which those assets were acquired, subject to any proper deductions for wear and tear or replacement, or for unpaid purchase money; and . . . . (*c*) so far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the trade or business, subject to any proper deductions for wear and tear or replacement."

The company, on its formation in 1909, purchased a rubber estate part of which was planted with immature rubber trees, the rest being unplanted. From that time until December 31, 1913, being the end of the last pre-war trade year, the company spent 89,600*l.* in clearing, reclaiming, planting, weeding, pruning and digging the estate. The company claimed that its assets should be regarded as having been increased by the expenditure in question. The Commissioners for the General Purposes of the Income Tax Acts held that, a rubber estate being a constantly varying asset, the mature and immature areas had an added capital value, apart from the purchase price, on December 31, 1913, and they adopted the company's contention:—

Held (1.) (Lord Wrenbury considering it unnecessary to decide this point), that the terms of the statutory definition of capital were complete and excluded all beyond their compass; (2.), on the facts, that it was not shown that the expenditure incurred in developing the estate had converted the property acquired by purchase within

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* *Present:* LORD BUCKMASTER, LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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clause (*a*) into a different asset falling within clause (*c*), and that therefore it ought not to be included as an item of capital.
Decision of the Court of Appeal [1922] 2 K. B. 398 affirmed.

APPEAL from an order of the Court of Appeal (1) (Lord Sterndale M.R., Scrutton and Younger L.JJ.) reversing a judgment of Sankey J., which affirmed the decision of the Commissioners for the General Purposes of the Income Tax Acts for the City of London on a case stated by them under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Income Tax Act, 1918, s. 49.

The facts are fully stated in the report of the case before the Court of Appeal and are summarised in the headnote.

The arguments on the appeal were the same as in the Court below.

1923. Feb. 20. *Sir John Simon K.C.* and *Disturnal K.C.* (with them *Latter K.C.* and *J. H. Bowe*) for the appellants.

Sir Leslie Scott K.C. and *Reginald Hills* (*Sir Ernest Pollock K.C.* with them) for the respondents.

Sir John Simon K.C. replied.

The House took time for consideration.

1923. March 22. LORD BUCKMASTER (read by LORD PARMOOR). My Lords, the determination of this appeal depends upon the true meaning to be given to the word "capital" in the Finance Act, 1915. It is important to keep this fact clearly in mind, for external consideration of what capital may ordinarily mean is really irrelevant and may lead to confusion and mistake.

By this statute the tax known as excess profits duty was to be levied and paid on the amount by which the profits of any trade or business in any accounting period ending after August 4, 1914, exceeded by more than 200*l.* the pre-war standard profits as defined in the Act. If the amount of the standard profits was less than a percentage standard as therein defined, it was to be a percentage standard which

(1) [1922] 2 K. B. 398.

was to be accepted in their place. This percentage standard was to be taken to be "an amount equal to the statutory percentage on the capital of the trade or business as existing at the end of the last pre-war trade year."

It is obvious, therefore, that the larger the amount of capital, the lower the amount of duty to be levied, and, with the praiseworthy intention of limiting this capital by exact definition, the Legislature by Part III. of the Fourth Schedule to the Act provided as follows: "1. The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be—(*a*) so far as it consists of assets acquired by purchase, the price at which those assets were acquired, subject to any proper deductions for wear and tear or replacement, or for unpaid purchase money; and (*b*) so far as it consists of assets being debts due to the trade or business, the nominal amount of those debts subject to any reduction which has been allowed in respect of those debts for income tax purposes; and (*c*) so far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the trade or business, subject to any proper deductions for wear and tear or replacement." "Nothing in this Part of this Schedule shall prevent accumulated profits employed in the business being treated as capital."

So far from accomplishing its purpose, this case is an illustration of the difficulties to which this definition has given birth.

The appellant company was incorporated on September 18, 1909, to acquire property in the Straits Settlements for the purpose of producing rubber and other native products. It did in fact acquire 6145 acres of land, 5663 of which were planted with immature rubber trees and 482 were unplanted. No part of the planted area was capable of producing rubber at the time of its acquisition and it requires about six years for a plant to become productive. From the time of the formation of the company down to December 31, 1913, the company spent 89,603*l.* 12*s.* 3*d.*, stated to be for the purpose of "cleaning, reclaiming, planting, weeding, pruning and

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digging the estate." The particulars of this sum have been furnished and in detail they give rise to no controversy. Speaking generally, it may be accepted that they were the expenses consequent upon the prudent management and development of the property, and, in fact, they were allowed as deductions from the profits for the purpose of assessing the duty.

This consideration, however, is not material. The question is, can this sum be treated as an item of capital on which the percentage is to be levied ?

Sankey J. held that it could. The Court of Appeal reversed his judgment and the present appeal is from their decision. The grounds of the appeal are clearly stated in the appellants' case and they may be summarised thus : (1.) That the capital on which the percentage is to be based is the capital " sunk in the business " ; (2.) that the added capital value of the estate was an asset and might be taken into account as capital for the purposes of the Act.

The first of these two arguments is shipwrecked on the words of the statute. Capital for the purpose required is not the capital sunk in the business unless it can be brought within the words of the definition. These words are, in my opinion, complete, and exclude all that is without their compass. I can give no other meaning to the opening sentence, which states that the capital " shall so far as it does not consist of money be taken to be " what the subsequent words provide. There is no room left for any class of capital not within the following phrases.

Of the succeeding classes (*c*) is the only one that is relevant, and upon that it is argued that in general terms the development of an asset creates an asset and that can properly be included as a separate item. Illustrations were given of building estates and collieries where it is urged that in one case the houses, and in the other the shafts and colliery workings, were assets apart from the original purchased property. I am not prepared to say that in certain circumstances this may not be true, but it must, in any case, be a question of fact as to when they " became assets of the

trade or business," and in the present instance there is no finding on the point, nor in the circumstances of the case could any such finding be easily reached. The growing tree requires undoubtedly an expenditure of labour to protect and develop its growth, but the tree remains the same entity, and it can at no time be stated that it becomes another asset. It may in the end become productive, but that is only a quality added to the old asset and not the creation of a new.

It is unnecessary to discuss the question whether what is an asset under sub-clause (*a*) can ever become another asset under sub-clause (*c*). It is impossible to consider all the variations of circumstances which may affect the meaning of the Act, and it may well be that in certain conditions an old asset may be used so that it may be regarded as a different one, or again, it may be that the altered conditions have merely added a new asset to the old. These are all questions of fact which must be separately determined in each case and it is undesirable to attempt to frame any general conclusion to cover them all.

In my opinion this appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. By s. 40 of the Excess Profits Duty Act of 1915 it is provided (sub-s. 2) that the pre-war standard of profits shall be taken to be the amount arising from the trade or business on the average of any two chosen by the taxpayer out of three last pre-war years. There is added in the sub-section the following—i.e., "provided that if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount was less than the percentage standard as hereafter defined, the pre-war standard of profits shall be taken to be the percentage standard."

This is a proviso in favour of the taxpayer. He is at liberty to adopt this artificial mode of fixation of profits resulting in what is known as the percentage standard. Pre-war profits being standardised high would produce advantage to the taxpayer as a datum of comparison with

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profits earned during the currency of the Act. But the taxpayer who has thus power to select a standard of profit fixed upon a percentage of capital can, of course, only exercise this option under the conditions of the Act, as to what capital is to be taken to be. These conditions are contained in Part III. of the Fourth Schedule of the Act to which Lord Buckmaster has referred. Sect. 1 of Part III. makes it impossible to determine capital by ordinary considerations applicable to either book-keeping or share-holding accounts, for it specifically provides that the amount of the capital of a business shall be taken to be three specific things.

These are: (*a*) the capital so far as it consists of assets acquired by purchase: the datum for them is the price paid; (*b*) the capital so far as consisting of debts due: the datum is the amount of the debts subject to the reduction allowed against these for income tax purposes. These two categories (*a*) and (*b*) cannot cover the present case, but it is argued that the case of the appellants is covered by (*c*) upon a proper construction thereof. That sub-section is as follows: "(*c*) So far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they become assets of the trade or business, subject to any proper deductions for wear and tear or replacement."

In order to apply this sub-section to the present case it is necessary to see what are the facts which, according to the appellants, warrant the disputed item of 89,604*l.* being treated as capital because of its being "any other assets which have not been acquired by purchase." The Surveyor of Taxes disallowed these items, denominating them "the following amounts which the Company has charged to capital but which the Surveyor alleges should have been paid out of revenue." A schedule of the particulars of these amounts is given. A consideration of these particulars is sufficient to answer the whole case of the appellants. The two largest items, each of over 32,000*l.*, are "general charges at estates," and "weeding in four years." Other large charges are for "destruction of pests," "digging out lalaing" and "digging

round trees." It is quite impossible by any sound consideration of the Act of Parliament to apply to these alleged capital assets the language of the schedule, for no reasonable view of that language can make management charges, weeding, destruction of pests or digging round trees "subject to any proper deductions for wear and tear or replacement," as if they were—which the section undoubtedly means—a corporeal asset in the proper sense of the term.

In my opinion the Surveyor was right. He treated all these items as they should have been treated—i.e., as proper revenue debits.

During the course of the debate it was in point of fact admitted that for the purpose of income tax this was exactly how they had been dealt with. This was in accordance with *Vallambrosa Rubber Co.* v. *Farmer* (1), which appears to have been quite correctly decided.

Of course, the argument is not conclusive, and possibly not legitimate, that the words of the taxing Act should be construed so as to make all the taxing Acts hang together. It is, however, satisfactory to know that the construction adopted before your Lordships will prevent both the taxpayer and the taxing authorities from occupying the anomalous and confused position that the same items which form in the case of income tax a just and proper revenue debit are to be treated, notwithstanding, for the purpose of the excess profits duty, as a capital asset.

I agree to the motion that the appeal be dismissed with costs.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. My Lords, I concur.

LORD WRENBURY. My Lords, s. 40, sub-s. 2, of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), enacts that "the provisions contained in the Third part of the Fourth

(1) (1910) 5 Tax Cas. 529.

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Schedule shall have effect with respect to the ascertainment of capital." Here I call attention to the word "ascertainment."

The initial words of Part III. of the Fourth Schedule, which is headed "Capital," are "The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be . . . ." Here I call attention to the word "amount."

I see that the Master of the Rolls in the course of his judgment says that Part III. of Sch. IV. "prescribes what elements, and what elements *alone*, are to be included in the capital of a trade or business." For the decision of the present case I do not find it necessary to say whether this is well founded or not. I will say no more than that the words of the Act may mean that in "ascertaining" the "amount" of the assets indicated in sub-ss. 1 (*a*), (*b*), and (*c*), of Part III. of the Fourth Schedule the "amount" is to be "ascertained" in manner there directed, and may not be equivalent to an enactment that the capital of the trade shall be taken to be the assets there indicated and those alone. For the present purpose it is unnecessary to decide the point, for this case falls, I think, to be determined by finding the true construction of the words of the Act with regard to assets which do fall within those indicated by the words of the clause in question.

Sub-s. (*a*) deals with assets "acquired by purchase." Sub-s. (*c*) deals with assets "not acquired by purchase." But in my judgment the fact that the trader still retains an asset which he acquired by purchase and which thus prima facie falls within (*a*) does not lead necessarily to the conclusion that its amount is to be ascertained under (*a*). For by reason of subsequent events it may have been so dealt with as that it is taken out of (*a*) and brought within (*c*). Thus suppose that the trader has paid 100,000*l*. for the purchase of land which he believed to contain coal and suppose that he has spent another 100,000*l*. in sinking a shaft and opening up the seams. He has then become the owner of an asset consisting of a developed coalfield. He is not the owner of

two assets—namely, (1.) the undeveloped land bought for 100,000*l.* and (2.) the development or facilities created by the work done. He is the owner of one new asset—namely, a developed coalmine which within (*c*) became an asset of his trade when the land became a mine. So if a man buys a quarter of an acre of land and builds a house upon it, he does not continue the owner of the bare land within (*a*) and become the owner of another asset—namely, a house upon the land within (*c*). A house cannot exist except in conjunction within the land on which it stands. The land was within (*a*), but when the house was built the land so to speak ceased to be in (*a*) and the owner became entitled to a new asset—namely, the house with the land on which it stood within (*c*). So if a man buys rubber and manufactures tyres and tubes he still owns the rubber which when he bought it was within (*a*), but by its manufacture he has created a new asset—namely, the manufactured goods, and these are within (*c*). The asset which was within (*a*) has merged or been converted into a new asset falling within (*c*).

Whether the facts are such that an asset which was within (*a*) has thus merged in another asset which falls within (*c*) is a question of fact—and for that reason I asked the appellants' counsel whether they had any finding of fact to that effect.

That leads me to consider the facts of the present case. The trader bought 6145 acres of land for 115,000*l.*—5663 of those acres were at the time of purchase planted with immature rubber trees. The remaining 482 acres were not planted. In the course of four years he expended 89,603*l.* 12*s.* 3*d.* on certain work on the property. The details of this sum are found in Exhibit C at p. 86 of the Record. The appellants in their case describe the work as being "clearing, reclaiming, planting, weeding and digging the immature areas." It was, I think, a question of fact whether the expenditure of the 89,603*l.* 12*s.* 3*d.* resulted in something equivalent to creating a new asset—namely, a rubber-bearing estate out of land purchased, which at the time of purchase was not such a property. The only finding in the matter

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is "that a rubber estate being a constantly varying asset, the mature and immature areas had an added capital value apart from the purchase price." This is not a finding such as is necessary to show that the property purchased which fell within (*a*) had been converted into a new asset falling within (*c*).

My Lords, for these reasons I concur in the opinion that this appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 22, 1923.

Solicitors for the appellants: *Mayo, Elder & Co.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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ATTORNEY-GENERAL . . . . . APPELLANT;

AND

ADELAIDE STEAMSHIP COMPANY, LIMITED . . . . . } RESPONDENTS.

Shipping—Collision—Charterparty—Form T.99—War or Marine Risk—Consequences of warlike Operations—Negligence in the Conduct of the warlike Operation.

When a ship engaged in a warlike operation comes into collision with another ship the loss occasioned by the collision is none the less a consequence of a warlike operation within the usual f. c. and s. warranty in a marine policy because the warlike operation is negligently conducted.

Busk v. *Royal Exchange Assurance Co.* (1818) 2 B. & Al. 73 and *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* [1898] 2 Q. B. 114 applied.

Inui Gomei Kaisha v. *Attolico*, Lloyd's List, July 20, 1918; Lloyd's List, February 10, 1919, distinguished.

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* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

Dictum of Rowlatt J. in *British and Foreign Steamship Co.* v. *The King* [1917] 2 K. B. 769, 773 disapproved by Lord Sumner.

Dicta of Bailhache J. in *British India Steam Navigation Co.* v. *London War Risks Insurance Association* [1919] 1 K. B. 632, 636, 637, and in *Ard Coasters* v. *The King* (1919) 35 Times L. R. 604, 605, and of Roche J. in *The Larchgrove* (1919) 36 Times L. R. 108, 109, and in *Charente Steamship Co.* v. *Director of Transports* (1921) 38 Times L. R. 148, 149 discussed by Lord Sumner.

Decision of the Court of Appeal [1923] 1 K. B. 59 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of McCardie J.

The steamship *Warilda* was requisitioned by the Admiralty on the terms of a charterparty in the form T.99, whereby the Admiralty were not to be responsible for marine risks, but undertook such war risks as would be excluded from an ordinary marine policy by the f. c. and s. warranty, including "all consequences of hostilities and warlike operations," and since 1917 she had been employed as an ambulance transport. On March 24, 1918, about 4 o'clock in the morning, a collision took place in the English Channel between the *Warilda* and the *Petingaudet*. The *Warilda* was proceeding from Havre to Southampton with 603 wounded men and a staff of doctors and nurses on board. In accordance with Admiralty instructions she was steaming at top speed and without lights. The *Petingaudet* was carrying a cargo of coke and was also steaming at high speed with dimmed side lights. Both ships were damaged by the collision.

In an action brought by the owners of the *Petingaudet* against the owners of the *Warilda*, the respondents, Hill J. found that the *Warilda* was alone to blame for the collision in that, being the give way ship, she failed to give way and did not slacken speed in time, and his decision was affirmed, first, by the Court of Appeal and, afterwards, by the House of Lords.

Thereafter the respondents by petition of right claimed compensation against the Crown under the terms of the charterparty for the damage sustained by them in consequence of the collision.

(1) [1923] 1 K. B. 59.

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McCardie J. held (1.) that at the time of the collision the *Warilda* was not engaged in a warlike operation; (2.) that the negligence of those in charge of the *Warilda* prevented the collision from being a consequence of a warlike operation.

The Court of Appeal (Bankes, Warrington and Atkin L.JJ.) reversed the decision of the learned judge on both points and referred the question of the amount of damages to the judge of the Commercial Court.

1923. Feb. 26. *Raeburn K.C.* (*Sir Ernest Pollock K.C.* and *R. H. Balloch* with him) for the appellant. Having regard to the recent decision of this House in the *Geelong Case* (*Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*) (1) it is not contested that at the time of the collision the *Warilda* was carrying out a warlike operation. The sole question is whether, in view of the fact that this collision was caused by the negligence of the *Warilda*, it can be said to be due to that warlike operation. In the case of capture, proof of capture is sufficient, however it came about. Not so in the case of collision. Collision being prima facie a marine peril, where negligence intervenes between the war risk and the collision it cannot be predicated that the collision was proximately caused by the warlike operation. In the circumstances of this case this is a loss by collision arising as a sea risk. It is not enough to show that the collision arose in the course of a warlike operation, it must be shown further that it arose out of the warlike operation. The warlike operation must be the direct or dominant cause of the loss, and when negligence intervenes that breaks the chain of causation: the *St. Oswald Case* (*British and Foreign Steamship Co.* v. *The King*) (2); *Inui Gomei Kaisha* v. *Attolico.* (3) The latter decision on negligence as an intervening cause has been followed in case after case, and in all the cases where the question whether the collision was a consequence of warlike

(1) (1922) 39 Times L. R. 133; since reported in [1923] A. C. 191.
(2) [1917] 2 K. B. 769, 773; [1918] 2 K. B. 879, 886, 889.
(3) Lloyd's List, July 20, 1918; Lloyd's List, Feb. 10, 1919.

operations has been before the Courts it has been thought material to state the fact of no negligence: the *Petersham Case* (*Britain Steamship Co.* v. *The King*) (1); the *Matiana Case* (*British India Steam Navigation Co.* v. *Liverpool and London War Risks Insurance Association*) (2); the *Ardgantock Case* (*Ard Coasters* v. *The King*). (3) No doubt, in the *Matiana Case* (4), Bailhache J. suggested that negligence on the part of the King's officer was immaterial, but that dictum is inconsistent with *Inui Gomei Kaisha* v. *Bernardo Attolico* (5) and is contrary to a dictum of Roche J. in *Owners of S.S. Larchgrove* v. *The King*. (6) The principle laid down by Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (7) supports the Crown's contention. [He also referred to *Charente Steamship Co.* v. *Director of Transports*. (8)] It is admitted that negligence is no defence to an underwriter under a marine policy: *Busk* v. *Royal Exchange Assurance Co.* (9); *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (10), and that has been used as an argument against the Crown; but where the peril relied upon is a war peril and collision is something which does not speak war at all, but speaks marine risk, then negligence is material.

MacKinnon K.C. (with him *Dunlop K.C.* and *Hugh Dumas*) for the respondents. The cases cited in support of the appeal are cases concerned with the absence of lights, and there negligence was held to be material as showing that the collision was not proximately due to the absence of lights, the two ships being visible either because it was not dark or because there was a moon. The meaning of those decisions was that the collision was not due to the absence of lights, but the Courts added unnecessarily that it was due to negligence. It has been said by Atkin L.J.—and the dictum

(1) [1919] 1 K. B. 575; [1919] 2 K. B. 670; [1921] 1 A. C. 99.

(2) [1919] 1 K. B. 632; [1919] 2 K. B. 670; [1921] 1 A. C. 99.

(3) 35 Times L. R. 604; (1920) 36 Times L. R. 555; [1921] 2 A. C. 141.

(4) [1919] 1 K. B. 637.

(5) Lloyd's List, July 20, 1918; Lloyd's List, Feb. 10, 1919.

(6) 36 Times L. R. 108, 109.

(7) (1863) 14 C. B. (N. S.) 259, 286.

(8) 38 Times L. R. 148; (1922) 38 Times L. R. 434.

(9) 2 B. & Al. 73.

(10) [1898] 2 Q. B. 114, 123.

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has been approved by this House—that almost any operation by a warship in time of war is a warlike operation. If you shoot a shell negligently the damage done to anything that is hit by it is the result of a warlike operation. So here if the *Warilda* was on duty as a warship or a quasi warship and a collision occurred that was a consequence of a warlike operation. This being a question of insurance, the question of negligence does not arise, and the cases on the absence of lights only show that it was not made out as an affirmative proposition that the absence of lights was the cause of the collision.

R. H. Balloch in reply. The illustration given by the respondents is not applicable because damage by a shell is prima facie a war risk, damage by collision is prima facie a marine risk: per Lord Atkinson in *Britain Steamship Co.* v. *The King.* (1)

The House took time for consideration.

1923. March 23. VISCOUNT CAVE L.C. My Lords, in the month of March, 1918, the steamship *Warilda* was under requisition by the Admiralty on the terms of the well-known form of charterparty called T.99. She was being used as an ambulance transport for the conveyance of wounded combatants from France to this country. She was painted grey and armed for defence against enemy submarines; and she had instructions to sail at night and without lights and at the maximum speed compatible with safe navigation. On the night of March 23–24 the *Warilda* was carrying about 600 wounded men, with the usual medical and nursing staff, from Havre to Southampton; and at about 4 o'clock in the morning of the 24th, when she was proceeding at about fifteen knots and without lights, she came into collision off St. Katharine's Head with the steamship *Petingaudet*, which was carrying a cargo of coke from Shields to Rochefort, with the result that serious damage was caused to both vessels. The owners of the *Petingaudet* having brought an

(1) [1921] 1 A. C. 99, 113.

action for damage caused to her by the collision, it was held that the collision was due to the negligence of the master of the *Warilda* in not giving way or slackening speed, and judgment was given for the owners of the *Petingaudet*; and this decision was affirmed by the Court of Appeal and by this House.

The question of insurance liability then arose. The charter-party T.99 contained the well-known clauses 18 and 19, clause 18 providing that the Admiralty should not be liable for injury by collision or other cause arising as a sea risk, and clause 19 providing (in effect) that the Admiralty should be liable for the risks of war including "all consequences of hostile or warlike operations"; and the owners of the *Warilda* presented a petition of right, alleging that the collision was a consequence of hostilities or warlike operations and claiming to be indemnified against their loss. The trial judge, McCardie J., decided in favour of the Crown; but his decision was reversed by the Court of Appeal (consisting of Bankes, Warrington and Atkin L.JJ.), who declared the Crown liable for such sum as should be found due to the suppliants by the Commercial Court. Thereupon the present appeal was brought.

Two questions were argued in the Courts below—namely, first, whether at the time of the collision the *Warilda* was engaged in a warlike operation, and secondly, whether, if so, the collision was a consequence of that warlike operation; and the case for the appellant raised both questions. But before the appeal came on for argument before your Lordships, this House had decided the case of the *Geelong* (*Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*) (1), and counsel for the appellant very properly admitted that in view of that decision and of the reasoning upon which it was founded, he could no longer contend that the *Warilda* was not engaged in a warlike operation. The first point therefore was not argued in this House.

(1) [1922] 1 K. B. 706; affirmed Dec. 14, 1922, since reported [1923] A. C. 191.

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The second point was put on behalf of the appellant in this way. It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. The Court of Appeal unanimously rejected this argument, and held the Crown responsible. My Lords, I agree with the view taken by the Court of Appeal. By the terms of the charterparty, the Crown is liable for " all consequences " of hostilities or warlike operations, nothing being said about their being skilfully or unskilfully conducted. The navigation of the *Warilda* in those waters at full speed without lights was clearly a warlike operation, which in itself involved peril to other ships. The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. The negligence of the master may have contributed to the loss; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches. Cases such as *Busk* v. *Royal Exchange Assurance Co.* (1) and *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (2) may not be directly in point; but the reasoning in those cases affords some analogy to the present, and it is not favourable to the appellant.

In my opinion, this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD SHAW OF DUNFERMLINE. My Lords, the steamship *Warilda* was in the year 1915 requisitioned by the Australian Government as a transport for bringing Australian troops to England. In July, 1916, she was taken over by the British Government for use as a military hospital ship, and she was in fact so used for some time. She was painted white, carried lights and bore a white flag with a red cross, all as provided by the Geneva Convention of 1896 and by the Hague

(1) 2 B. & Al. 73. (2) [1898] 2 Q. B. 114.

Conference of 1907. As a result, however, of the conduct of the German naval authorities in disregarding the sanctity of hospital ships, particular steps were rendered necessary for the protection of vessels in the hospital service across the English Channel. The *Warilda* was accordingly taken off the list of hospital ships and was thereafter known as an ambulance transport and treated in the same manner as a troops transport. This was in accordance with the written order of the Ministry of Shipping. The vessel was "painted grey with dazzle markings, the Red Cross flag ceased to fly and she steamed without lights. A 12-lb. gun was placed aft and two or three Royal Naval men were taken on board for the purpose of erecting the gun if the need arose."

It appears accordingly to be beyond question that the ambulance transport *Warilda* thus converted and armed was part of the naval forces of the country.

On March 24, 1918, she was proceeding in accordance with naval orders at a full speed of fifteen knots without lights from Havre to Southampton, carrying 600 wounded men, with the usual staff of doctors and nurses. She came into collision with the steamship *Petingaudet*, which was also steaming at high speed with side lights dimmed. It should further be mentioned that, by naval orders, the *Warilda* was directed to proceed even in a fog at full speed. It has been judicially affirmed, however, that the *Warilda* was alone to blame for the collision.

The terms of requisition under the charterparty have been already cited. The risks of war taken thereunder by the Admiralty are those which would be excluded from an ordinary policy "by the following or similar, but not more extensive, clause." This clause which is quoted includes the words "and also from all consequences of hostilities or warlike operations."

I do not have any doubt that at the time of the collision the *Warilda* was sailing in the course of warlike operations. It was argued that while this might be so, yet the collision was not a consequence of these operations. I do not think that in the state of the authorities this contention can be

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sustained. It was admitted that the collision must be attributable to one of two things, either to the warlike operations or to a sea risk, and the enumeration of sea risks even under the requisition of the charterparty no doubt includes "collision" . . . . "or any other cause arising as a sea risk." It seems out of the question to infer from this language that all collisions are ex necessitate sea risks. And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, with lights doused and other such warlike precautions, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations.

The appellant's cause was powerfully presented; but I cannot myself see that the shifting of category to which I have alluded can be said to have been accomplished by reason of the negligence of those in charge of the vessel.

LORD SUMNER. My Lords, in this case the contract of insurance (for such this clause, No. 19 of charter T.99, in effect is) provides that: "The risks of war, which are taken by the Admiralty, are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive, clause: . . . . warranted free . . . . from all consequences of hostilities or warlike operations. . . . .'"

The *Warilda* and the *Petingaudet* were damaged in collision, and collision is a risk included in an ordinary English policy of marine insurance. Accordingly, the suppliant must show that, under the circumstances of this case, the damage would be excluded from the protection of such a policy by such words as those above quoted. In effect, there is no substantial inaccuracy in saying that the question is, "Was this loss caused directly and proximately by a warlike operation?" and I think there is no substantial doubt that the answer must be "Yes."

The collision came about by both vessels proceeding during their respective voyages on courses which intersected, and at times and speeds which brought them simultaneously to the point of intersection. In keeping those courses the *Petingaudet* was right and the *Warilda* was wrong, but, as each vessel in proceeding to the point of collision was proceeding on her voyage and neither had abandoned either the destination or the purpose of her voyage, it was part of the operation, in which each vessel was engaged, to proceed to that point. By admission the *Warilda's* operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might be different. There might, for example, have been an abandonment of the ship's warlike operation altogether, but it is unnecessary to do more than save such a case.

Negligence is a quality of the navigation as carried out, when two ships run into one another, but is not a distinct operation in itself. Whether the navigating officer keeps his course when he should have given way, or gives way when he should have kept his course, what proximately causes the damage is the forcible impact of the two vessels, and it has long been settled that, under an ordinary policy against marine risks, an assured can recover for a loss by collision notwithstanding that the collision was solely brought about by the negligence of his employees, the captain or

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Lord Sumner.

crew. I cannot see any valid ground for deciding otherwise, where the collision is part of a warlike operation, badly conducted on the part of those in charge of the ship which is engaged in such an operation. At any rate, whatever possibility of debate might arise where the negligence consisted in the positive commission of a false manœuvre, none can arise where, as here, the negligence consisted in failing to give way, or in failing to infer, when the *Petingaudet* became visible, that it was the *Warilda's* duty to give way.

My Lords, I do not think that this view is inconsistent with any decided authority. *Inui Gomei Kaisha* v. *Attolico* (1) turns out on examination of the language of Roche J. to be quite distinguishable. In that case the warlike operation relied upon was the navigation of two merchantmen, proceeding on their respective commercial voyages without lights in contravention of the international rules for navigation at sea, because they were ordered to do so by the competent naval authority during and by reason of the war. Whether either vessel was performing a warlike operation or not ceased to be a matter for consideration, as soon as it was proved that, lights or no lights, each ship saw the other at a time when appropriate helm action might have been likely to avoid collision but, owing to default, was not taken. From that point the absence of navigating lights was at most a causa sine qua non, as it is called, and probably was no more than a picturesque introduction which might not assist the Court but could do the parties no harm. In the result the collision was brought about by actual helm action, taken ad hoc but taken wrongly, by persons who would have been no better off at the moment if each ship's lights had been burning. The resulting collision was not directly caused by a warlike operation but was caused by collision in the course of a commercial operation, attended by negligent navigation.

The judgment of Roche J. is summed up thus in his conclusions: "The onus," he says, "is on the Plaintiffs here and involves that they should satisfy me that the collision must have happened, in the sense that the vessels were seen

(1) Lloyd's List, July 20, 1918; Lloyd's List, Feb. 10, 1919.

at such a distance that they must have collided, and that either there was no wrong action, or that the wrong action made no difference. . . . . I am satisfied at all events that the collision and the loss were neither of them inevitable when the vessels sighted one another, and in these circumstances the Plaintiffs have not established that navigation without lights is a proximate cause either of this collision or this loss." Read with this judgment I think that any difficulties, which might otherwise arise, on the judgment of Bankes L.J. in affirming Roche J., are removed. He says "there was an intervening cause of the collision, because, without this negligence, which has been found against the persons in charge of these vessels, the accident would not have happened in spite of the fact that they were being navigated without lights." "This negligence" here is the taking of helm action, which the respective navigating officers were free to take or not to take, and, as it so happened, that action was negligent, but it constituted a new independent intervening cause not because it was negligent but because it was independent. This is its material aspect as a peril insured against causing loss. Negligence is the aspect of it which is further material in a collision action, in which legal responsibility for wrong done has to be ascertained.

Various authorities were cited, in which it is noted in the judgments that negligence was not proved or not alleged as one of the circumstances of the case. Many of the references to negligence in the "warlike operations" cases are merely savings of the present question ex abundanti cautela and cannot be pressed further—e.g., Bailhache J. in *The Petersham* (1); Scrutton and Duke L.JJ. in *The St. Oswald* (2); Atkin L.J. in *The Matiana.* (3) It appears to me that the dictum of Rowlatt J. in *The St. Oswald* (4), "if I could say that the *Suffren* was to blame for starboarding I should have held that the negligence of her commander had intervened and immediately caused the disaster" is difficult to support, but, as the negligence there suggested

(1) [1919] 1 K. B. 575, 580, 581.
(2) [1918] 2 K. B. 879, 887, 889.
(3) [1919] 2 K. B. 670, 698.
(4) [1917] 2 K. B. 769, 773.

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was an act of negligent commission, it may not be absolutely necessary to negative it in the present case, where the negligence is only a negligent omission. The dicta of Bailhache J. in *The Matiana* (1)—namely, that, "if the stranding was due to the master's negligence," probably this would prevent its being proximately caused by the warlike operation, if any, which she was performing, while "negligence on the part of the King's officer" would not matter; "the operation would still be a warlike operation although badly performed," appear to me to be right in the latter case, and wrong in the first. Roche J. says in *The Larchgrove* (2): "Where negligence existed, it broke the chain of causes and might prevent a loss from being attributable to a warlike operation, though it did not follow that all negligence would be outside of the warlike operations." With this, as a whole, I agree, understanding it to refer to such an illustration as that put by Erle C.J. in *Ionides* v. *The Universal Marine Insurance Co.* (3); but the initial general words down to "chain of causes" are too wide. So in *The Ardgantock* (4) Bailhache J. is reported as saying, "if negligence on the part of the *Ardgantock* was the effective cause of the loss the case would be one of loss by marine risk." Literally, this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that, if the loss of the *Ardgantock* was proved affirmatively to be due to her own fault, it would not be caused by the warship and its warlike operations. He proceeds: "As to the *Tartar*, if she was on a warlike operation, it would not matter, whether she was negligent or not"; with this I agree.

In the *Charente Steamship Co.* v. *Director of Transports* (5) Roche J. lays it down that in a collision between a merchantman and a ship engaged in a warlike operation during the war, both showing no lights, if the merchantman was solely to blame, the collision would not be the result of the other ship's warlike operation; while, if it was the other ship

(1) [1919] 1 K. B. 632, 636, 637.
(2) 36 Times L. R. 108, 109.
(3) 14 C.B. (N. S.) 259, 286.
(4) 35 Times L. R. 604, 605.
(5) 38 Times L. R. 148, 149; affirmed 38 Times L. R. 434.

that was to blame, still, in most cases, this would not be a new independent cause, but there would only be a negligent warlike operation, for where the negligence consists in carelessly carrying out the operation in progress, the results are a consequence of hostilities, and he adds, "Where, in such a case, an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, the loss was a consequence of hostilities." This was affirmed in the Court of Appeal and seems to me to have been right.

Negligence may be material as going to inevitability, where the inevitability of a series of consequences is part of the proof that a more distant occurrence was truly the proximate cause of the ultimate result. This is the illustration of Erle C.J. in *Ionides* v. *The Universal Marine Insurance Co.* (1), as I understand it. So, conversely, where a peril is in operation and produces in due course its direct damage, that peril does not become a remote cause because, before the actual collision occurs, attempts are made to avert the result, which fail. This is pointed out by Rowlatt J. in *The St. Oswald.* (2) When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary

(1) 14 C. B. (N. S.) 259, 286. (2) [1917] 2 K. B. 769, 773.

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in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified.

Accordingly I think that this appeal fails.

LORD PARMOOR. My Lords, a charterparty entered into by the respondents with the Admiralty contained two clauses which are relevant in the present appeal. The first of these provided that the Admiralty should not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. The second contains the following words, "warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The appellant contends that the collision by which the *Warilda* was injured was a sea risk, from liability for which the Admiralty are exempted under the terms of the charterparty, and that such collision was not the consequence of warlike operations within the meaning of the charterparty on two grounds, (1.) that the *Warilda* at the time of the collision was not engaged on a warlike operation, (2.) that, assuming that the *Warilda* was engaged on a warlike operation, the collision from which the damage resulted was not the consequence of that warlike operation.

The first point was abandoned on the hearing of the appeal. On the second point it was argued that the collision and damage were not the consequence of a warlike operation, but resulted from the negligent navigation of the master of the *Warilda*. That the *Warilda* at the time of the collision was negligently navigated is not questioned. This has been determined in a previous decision in this House. The only question therefore which arises, is, whether the navigation of a warship engaged on a war duty ceases to be a warlike operation when it is performed in a negligent manner. In my opinion this question can only be answered in the

negative. At the material date the *Warilda* had what has appropriately been called the status of a warship, and was engaged on a war duty—namely, the carriage of wounded soldiers. The negligence of the master in navigating the *Warilda* did not affect either the status of the vessel as a warship or the nature of the duty in which she was engaged. On the contrary it occurred while the vessel was in fact carrying out the war duty for which she had been chartered.

It follows that the *Warilda* was engaged at the time of the collision in a warlike operation, and that it is not an answer to the claim that at the time of the collision there was negligent navigation on the part of the *Warilda*.

In my opinion the appeal fails and should be dismissed with costs.

LORD WRENBURY. My Lords, in this case two material facts are not in dispute—namely, first: that the *Warilda* was engaged in a warlike operation; and, secondly: that the master of the *Warilda* was negligent. The operation that was in progress was the navigation of the vessel. It was a warlike operation in that the vessel was an "ambulance transport," carrying some 600 wounded and a staff of doctors and nurses from Havre to Southampton and steaming at night at some fifteen knots without lights.

By art. 18 of the charterparty the Admiralty was not liable for sea risks. But by art. 19 it was liable for "consequences of hostilities or warlike operations." The question is whether the collision which took place was a sea risk or a consequence of a warlike operation.

In *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (1) it was decided that in the case of a policy of marine insurance, loss by stranding occasioned by the negligent navigation of the master was a loss in respect of which the underwriters were liable. The principle is that the underwriter insures against a loss occasioned by a peril of the sea, and that stranding is

(1) [1898] 2 Q. B. 114.

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none the less a peril of the sea though brought about by negligent navigation. The negligence does not alter the character of the sea peril, which still remains the causa proxima. So if I insure my house against fire, or my carriage or car against road risks, the risk that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I sought insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the causa proxima of the loss—the negligence is a cause more remote. As regards sea peril, I may perhaps express it by saying that the underwriter insures against the sea peril, however it may happen—including, therefore, negligence of the master. It is otherwise if the loss occurs through the wilful negligence or wilful act of the assured. In that case the loss does not "happen," but is caused by the assured himself, and, consequently, he cannot recover.

Collision is a sea risk and art. 18 of the charterparty holds the Admiralty not liable in the case of collision "or any other cause arising as a sea risk." But art. 19 renders it liable for "all consequences of hostilities or warlike operations." The question, therefore, is as between sea risk and war risk; was this loss a consequence of the warlike operation in which the vessel was engaged? Does the fact that the master was negligent render the loss one which was not a consequence of that warlike operation? In my judgment it does not. The principle of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (1) applies. The operation in progress was the navigation of the ship; that operation was a warlike operation, and none the less because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter the character of the operation, and the

(1) [1898] 2 Q. B. 114.

loss was a consequence of the warlike operation, which still remained the causa proxima.

My Lords, for these reasons I think that this appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 23, 1923.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Parker, Garrett & Co.*

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[HOUSE OF LORDS.]

RUSSELL . . . . . APPELLANT;

AND

RUDD . . . . . RESPONDENT.

H. L. (E.)* 1923 *March* 20.

Workmen's Compensation—Agreement for Settlement of all Claims by Payment of lump Sum—Agreement for Redemption of weekly Payment—Contracting out—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1 *and* 3: *s.* 3, *sub-s.* 1; *Sch. I., para.* 17; *Sch. II., para.* 9 (*d*).

An agreement between an injured workman and his employer for the settlement of all claims to compensation under the Workmen's Compensation Act, 1906, by the payment of a lump sum, apart from the provisions of the Act relating to agreements for the redemption of a weekly payment, is void as being a contracting out of the Act contrary to s. 3, sub-s. 1:—

So *held* by Viscount Cave L.C., Lord Dunedin, Lord Shaw of Dunfermline, and Lord Buckmaster; Lord Carson dissenting.

Per Viscount Cave L.C. and Lord Shaw of Dunfermline: There may be an agreement between an employer and a workman for redemption of a weekly payment where the weekly payment has not been previously fixed by arbitration or agreement, but there is simply a liability under the Act to make a weekly payment.

Ryan v. *Hartley* [1912] 2 K. B. 150; *Hudson* v. *Camberwell Corporation* (1917) 86 L. J. (K. B.) 558; 10 B. W. C. C. 400; *Rawlings, Ld.* v. *Hodgson* (1918) 11 B. W. C. C. 73; *Williams* v. *Minister of Munitions* (1919) 88 L. J. (K. B.) 1105; 12 B. W. C. C. 213; and *Haydock* v. *Goodier* [1921] 2 K. B. 384 overruled.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a decision of the judge of the County Court of Middlesex

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD BUCKMASTER, and LORD CARSON.

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holden at Edmonton in an arbitration under the Workmen's Compensation Act, 1906.

The following statement is taken from the opinion of the Lord Chancellor :—

"The appellant, Henry Russell, was a carman in the employment of the respondent, and on October 26, 1920, met with an accident arising out of and in the course of his employment and received injuries. The respondent did not dispute his liability to pay compensation under the Workmen's Compensation Act, and without entering into any agreement with the appellant paid him 35*s.* per week (the maximum sum to which he could be entitled as compensation) from the time of the accident until August 13, 1921. In the month of June, 1921, an agent of the insurance company in which the respondent was insured called upon the appellant and informed him that, in view of a medical report, he would no longer receive full compensation and proceeded to negotiate with him for a settlement of all claims for a lump sum ; and, ultimately, an agreement was entered into in the following terms : 'The said Henry Russell agrees to accept and the said George Rudd agrees to pay the sum of 75*l.* in full settlement and discharge of all claims in respect of the aforementioned accident.' The respondent shortly afterwards forwarded to the registrar of the county court a memorandum of the above agreement with the necessary forms, and applied to have it recorded under para. 9 of the Second Schedule to the Act. The registrar refused to record the memorandum on the ground of inadequacy, and referred the matter to the county court judge in accordance with clause (*d*) of the above-mentioned paragraph. Meanwhile, the appellant, whose compensation had been stopped on August 13, filed a request for arbitration in accordance with the Workmen's Compensation Rules, and this application came on for hearing before the judge, together with the reference of the above-mentioned application to record the memorandum. The learned county court judge, after hearing evidence and arguments on the matter, found as a fact that the above-mentioned agreement was an agreement as to the

redemption of a weekly payment within para. 9 of Sch. II. to the Act, and that the sum of 75*l.* was inadequate; and he refused to record the memorandum, and in the arbitration proceedings made an award in favour of the appellant of 13*s.* 6*d.* a week from August 14, 1921. The respondent appealed against the order and award of the county court judge, and the Court of Appeal on February 7, 1922, allowed the appeal and ordered the award to be set aside and the memorandum of agreement to be recorded and an award for the respondent to be entered with costs. Thereupon the present appeal was brought."

1923. Jan. 26, 29. *Harold Morris K.C.* (with him *Samuel J. Duncan*) for the appellant. Two questions are raised by this appeal: 1. Is this an agreement for a weekly payment within the meaning of the Workmen's Compensation Act? 2. If not, is it an agreement authorized by the Act? As to 1: It is a question of fact whether an agreement is an agreement for the redemption of a weekly payment or not. The county court judge has found this fact in the appellant's favour and, there being evidence to support that finding, his decision is not open to review. The Court of Appeal were wrong in holding that there cannot be an agreement for the redemption of a weekly payment unless there is in existence at the time of making the agreement a weekly payment fixed by agreement or award. An agreement for the redemption of a weekly payment means an agreement for the redemption of the liability to make a weekly payment. As to 2: An agreement between an employer and a workman for the settlement of all claims under the Act by the payment of a lump sum, unless it is an agreement for the redemption of a weekly payment, is a contracting out of the Act contrary to the prohibition contained in the proviso to sub-s. 1 of s. 3, and is void. The agreement in question in this case is not in terms limited to claims under the Act, but no other compensation was contemplated by the parties and it must be so construed. Sub-s. 1 of s. 1 provides for the payment of compensation in accordance with the First Schedule to the Act, but the only

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form of compensation provided by the Schedule, where death does not result from the injury, is a weekly payment.

Para. 17 of the First Schedule deals with redemption and authorizes an agreement being made for the redemption of a weekly payment by a lump sum, but such an agreement to be effective must be recorded under para. 9 of the Second Schedule to the Act, and by proviso (*d*) to that paragraph the registrar may refuse to record the agreement by reason of the inadequacy of the sum and may refer the matter to the judge. It will be said that an agreement in settlement of all claims under the Act is contemplated by sub-s. 3 of s. 1, but "compensation" in that sub-section is used in the same sense as in sub-s. 1 of s. 1, as denoting compensation in accordance with the First Schedule, which is also mentioned in sub-s. 3, and, in a case where death does not ensue from the injury, can only refer to a weekly payment. This appeal involves the overruling of a series of decisions in the Court of Appeal, which it is submitted are contrary to the terms of the Act. In *Ryan* v. *Hartley* (1) the Court of Appeal held that an agreement by an adult workman to accept a lump sum in satisfaction of all claims under the Act was not a violation of the Act and was valid, and the decision proceeded on the basis that the agreement could not be an agreement for the redemption of a weekly payment, because no weekly payment had ever in fact been made. That case was followed in *Hudson* v. *Camberwell Corporation* (2); *Rawlings, Ld.* v. *Hodgson* (3); *Williams* v. *Minister of Munitions* (4); and *Haydock* v. *Goodier* (5); and in three last named cases it was expressly held that it was essential to an agreement for the redemption of a weekly payment that there should have been in existence a weekly payment fixed by agreement or arbitration. It may, however, be fairly inferred from the language of Atkin L.J. in *Williams* v. *Minister of Munitions* (6) and of Scrutton L.J. in *Haydock* v. *Goodier* (7)

(1) [1912] 2 K. B. 150.
(2) 10 B. W. C. C. 400.
(3) 11 B. W. C. C. 73, 80; (1918) W. C. & Ins. Rep. 184, 187.
(4) 88 L. J. (K. B.) 1105; 12 B. W. C. C. 213.
(5) [1921] 2 K. B. 384; 14 B. W. C. C. 50.
(6) 88 L. J. (K. B.) 1105; 12 B. W. C. C. 223.
(7) [1921] 2 K. B. 396; 14 B. W. C. C. 62.

and in the present case that they did not approve of *Ryan* v. *Hartley* (1), although they were bound by that decision. The Act does not provide for any settlement other than a redemption of a weekly payment, and if this agreement is something which is not authorized by the Act it is prohibited by s. 3, sub-s. 1. It follows that *Ryan* v. *Hartley* (1) and the decisions which have followed it are erroneous.

[He also referred to: *Baker* v. *Jewell* (2); *Payne* v. *Fortescue & Sons* (3); *Clawley* v. *Carlton Main Colliery Co.* (4); *Fox* v. *Battersea Borough Council* (5); *British and South American Steam Navigation Co.* v. *Neil* (6); *Crossfield & Sons* v. *Tanian* (7); *M'Alinden* v. *Nimmo & Co.* (8)]

[LORD DUNEDIN referred to *Freeland* v. *Summerlee Iron Co.* (9); *Pearson* v. *Babcock & Wilcox* (10); *Sharman* v. *Holliday and Greenwood, Ld.* (11); and *Scott* v. *Long Meg Plaster Co.* (12)]

Compston K.C. and *W. Shakespeare* for the respondent. The question is whether the Act contains anything to take away the right of a workman of full age and under no disability to compromise his claim to compensation under the Act on any terms he pleases. If not, this agreement must stand. Sub-s. 1 of s. 1 refers to the First Schedule, which shows that a judicial arbitrator cannot award a lump sum, but must award a weekly payment. Sub-s. 3 of s. 1 clearly shows that any question as to the amount or duration of compensation may be settled by agreement. "Compensation" in that sub-section is not necessarily limited to a weekly payment in cases where death does not ensue, and an agreement as to the amount of compensation includes an agreement for payment of a lump sum. This construction is borne out by para. 9 of the Second Schedule, where "compensation" and "weekly payment" are used in contradistinction. That paragraph follows the language of sub-s. 3 of s. 1, and uses the expression "the amount of compensation." Clause (*d*)

(1) [1912] 2 K. B. 150.
(2) [1910] 2 K. B. 673.
(3) [1912] 3 K. B. 346.
(4) [1918] A. C. 744, 758.
(5) (1911) 4 B. W. C. C. 261.
(6) (1910) 3 B. W. C. C. 413.
(7) [1900] 2 Q. B. 629.
(8) [1920] A. C. 39.
(9) 1913 S. C. (H. L.) 8.
(10) 1913 S. C. 959.
(11) [1904] 1 K. B. 235.
(12) (1914) 7 B. W. C. C. 502.

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of that paragraph authorizes the registrar to refuse to record the memorandum of an agreement as to the amount of compensation payable to a person under any legal disability or to dependants on various grounds, including inadequacy. That implies that, apart from disability or dependency, no such protection is granted. The clause also extends the protection to the case of an agreement for the redemption of a weekly payment by a lump sum. Such an agreement involves special considerations which might well induce the Legislature to give the workman protection. But, except as above stated, an agreement as to the amount of compensation, which includes an agreement for the payment of a lump sum, is not subject to the jurisdiction of the Court. Sch. II., para. 1, provides for the settlement of any matter which is normally settled by arbitration by a representative committee. There the Legislature deliberately takes the case out of the hands of the Court, and it is submitted that it would be within the power of the committee to award a lump sum as compensation.

[LORD CARSON referred to *Mulholland* v. *Whitehaven Colliery Co.* (1)]

Sect. 3, sub-s. 1, of the Act contains nothing which excludes an agreement made under s. 1, sub-s. 3. The proviso on which the appellant relies is annexed to a sub-section dealing with a scheme of compensation approved by the Registrar of Friendly Societies and, having regard to the context, it cannot bear the wide construction sought to be put upon it by the appellant. The expression "save as aforesaid" in the proviso includes a reference to s. 1, sub-s. 3.

The question whether the agreement in question was an agreement for the redemption of a weekly payment must be judged from the language of the agreement itself. So judged, this agreement, as the Court of Appeal have held, was not an agreement for the redemption of a weekly payment at all, but was an agreement fixing the amount of compensation once for all. From the year 1912 there has been a steady stream of authority in favour of the respondent's contention. The respondent relies particularly

(1) (1910) 3 B. W. C. C. 317.

on the language of Neville J. in *Rawlings, Ld.* v. *Hodgson* (1) and of Younger L.J. in *Haydock* v. *Goodier*. (2) This agreement, being an agreement by a man of full age for the settlement of his claims under the Act by the payment of a lump sum and not being an agreement for the redemption of a weekly payment, excluded the making of an award by the county court judge, and the decision of the Court of Appeal was right.

[LORD CARSON referred to *O'Callaghan* v. *Martin*. (3)]

Harold Morris K.C. replied.

The House took time for consideration.

1923. March 20. VISCOUNT CAVE L.C. My Lords, this is an appeal from an order of the Court of Appeal in England reversing an order and award of the judge of the Edmonton County Court, and raises important questions under the Workmen's Compensation Act, 1906. [His Lordship stated the facts and continued :] Before dealing with the questions which arise for decision on this appeal, it appears desirable to describe shortly the scheme of the Act so far as now material. Sect. 1, sub-s. 1, provides that if in any employment personal injury by an accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as after mentioned, be liable to pay compensation in accordance with the First Schedule to the Act. The compensation provided by the First Schedule takes the form, where the death of the workman results from the injury, of a lump sum payable to his dependants, and where total or partial incapacity for work results, then of a weekly payment during the incapacity. Sect. 1, sub-s. 3, provides that if any question arises in any proceedings under the Act as to the liability to pay compensation under the Act (including any question as to whether the person injured is a workman to whom the Act applies) or as to the amount or duration of compensation under the Act,

(1) 11 B. W. C. C. 73, 84. (2) [1921] 2 K. B. 384, 401–2.
(3) (1904) 38 Ir. L. T. 152.

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"the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." The Second Schedule contains a number of provisions as to arbitration and also provisions for recording in the county court a memorandum of any agreement. There are also certain provisions to which I will refer later, for the redemption of a weekly payment by a lump sum. By s. 3, sub-s. 1, provision is made for registering a scheme conferring upon the workmen in any employment alternative benefits not less favourable than those provided by the Act, and it is provided that, "save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

The first question which arises on this appeal is whether, apart from the provisions contained in the Schedules to the Act relating to the redemption of a weekly payment by a lump sum, the agreement made between the appellant and the respondent in this case is a valid agreement. In my opinion it is not. The provision in s. 3, sub-s. 1, that the Act shall apply notwithstanding any contract to the contrary, affects not only agreements made before an accident occurs, but also agreements entered into after an accident has happened. This was so held by Lord Wrenbury in *Clawley* v. *Carlton Main Colliery Co.* (1) Of course the prohibition does not apply to agreements authorized by the Act itself; and it is argued on behalf of the respondent that the agreement in question was authorized by s. 1, sub-s. 3, and particularly by the words "if not settled by agreement." In my opinion these words do not cover an agreement for the payment to a workman suffering from incapacity of a lump sum in settlement of all claims under the Act. The effect of s. 1, sub-s. 1, of the Act is to entitle such a workman to compensation in the form of a weekly payment; and the effect of s. 1, sub-s. 3, so far as material, is that any question as to the "amount or duration of compensation under the Act"—that is to say, in a case of incapacity of the amount or duration of the weekly

(1) [1918] A. C. 744, 758.

payment—may be settled either by agreement between the employer and the workman, or by arbitration. It is plain that an arbitrator could not, under this sub-section, award compensation in the form of a lump sum; and, in my opinion, the power to settle by agreement is limited in like manner. The intention of the Act is that a workman who is suffering from total or partial incapacity caused by an accident shall receive a weekly sum, which shall be subject to review from time to time (Sch. I., para. 16), and shall be incapable of being assigned or charged (Sch. I., para. 19), but which may be redeemed by agreement with the employer (Sch. I., para. 17), subject to the approval of such agreement by the county court (Sch. II., para. 9). To substitute for compensation of that character the payment of a lump sum, fixed only by agreement between employer and workman and free from any examination by the Court, is to contract out of the Act, and accordingly is a contravention of s. 3, sub-s. 1, of the Act and void.

The second question which arises is whether agreements such as the agreement in question fall within Sch. I., para. 17, and Sch. II., paras. 9 and 10, so as to be valid if registered under the latter Schedule. If your Lordships should agree with me as to the effect of s. 3, sub-s. 1, of the Act, this question will not closely concern the present appellant, as his agreement, if falling within Sch. II., has been disallowed under para. 9; but the question has been fully argued, and it is desirable to answer it.

Sch. I., para. 17, enables an employer to redeem a weekly payment which has been continued for not less than six months, a proviso being added that "nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum." The effect of para. 9 of Sch. II., so far as now material, is that, where the amount of compensation under the Act has been ascertained or any other matter decided under the Act by agreement, a memorandum of the agreement is to be sent to the registrar of the county court, who, on being satisfied as to its genuineness, is to record it in a special register, and thereupon the memorandum is to be for all

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purposes enforceable as a county court judgment; but by clause (*d*) it is provided that where it appears to the registrar that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the sum, or for other reasons which are specified, he may refuse to record the memorandum of the agreement and may refer the matter to the judge, who is to make such order as in the circumstances he may think just. Clause (*e*) of the same paragraph empowers the judge, within six months after a memorandum has been recorded, to order that the record be removed from the register on proof that it was obtained by fraud or undue influence, or other improper means; and by para. 10 it is provided that an agreement as to the redemption of a weekly payment by a lump sum, if not registered in accordance with the Act, is not to exempt the employer from liability to continue to make a weekly payment.

Now, is the agreement in question an "agreement as to the redemption of a weekly payment by a lump sum" within the meaning of these provisions? It was held by the Court of Appeal, following previous decisions, that this expression applied only to an agreement for redemption of a weekly payment which had been previously fixed by arbitration or agreement, and accordingly that, no such weekly payment having been fixed in this case, the provisions did not apply. With great respect to the learned judges who have taken that view, I think that it puts too narrow an interpretation upon the words to be construed. When a workman is suffering from incapacity caused by an accident falling within the Act, he becomes ipso facto entitled to a weekly payment which, though not ascertained as to amount, is capable of being immediately ascertained by the process laid down in the statute; and I see no reason why the liability to make this ascertainable weekly payment should not be redeemed, though the amount has not, in fact, been fixed. Admittedly the parties might agree on a weekly sum under s. 1, sub-s. 3, of the Act, and might then at once agree for its commutation by a lump sum; and it does not appear to me that it is

essential that they should go through the form of agreeing the amount of the weekly payment before settling the lump sum to be paid. It may be that an agreement to pay a lump sum in full settlement of all claims is not very appropriately described as an agreement as to the redemption of a weekly payment by a lump sum; but, in fact, the only existing claim in this case was a claim to a weekly payment, and it is that claim which was commuted under the agreement. Further, an agreement such as the agreement in question is (as I have held) void altogether unless it can be sustained as an agreement for the redemption of a weekly payment within the meaning of Sch. I., para. 17, and Sch. II., paras. 9 and 10; and it appears to me to be right, *ut res magis valeat quam pereat*, to put upon a document a construction which gives it validity if it is reasonably capable of that construction. I think, therefore, that an agreement of this kind falls within the Schedule.

My Lords, I am, of course, conscious that in advising your Lordships to come to these conclusions I am recommending the House to overrule a series of decisions of the Court of Appeal in England. It was held by that Court in *Ryan* v. *Hartley* (1) that there was nothing in the Act of 1906 to prevent an adult workman from coming to an arrangement with his employer to accept a lump sum in satisfaction of all claims under the Act, and that such an agreement, if entered into, would be valid, though not registered under the Act; and this decision was followed in *Hudson* v. *Camberwell Corporation* (2); *Rawlings, Ld.* v. *Hodgson* (3); *Williams* v. *Minister of Munitions* (4); and *Haydock* v. *Goodier* (5); as well as in the present case. Further, it was held by the same Court in *Rawlings, Ld.* v. *Hodgson* that there could not be an agreement for the redemption of a weekly payment until the weekly payment had been fixed; and this decision also was followed in *Haydock* v. *Goodier* and in the present case. This is a formidable list of authorities,

(1) [1912] 2 K. B. 150.
(2) 10 B. W. C. C. 400.
(3) 11 B. W. C. C. 73.
(4) 12 B. W. C. C. 213.
(5) [1921] 2 K. B. 384; 14 B. W. C. C. 50.

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and I should hesitate long before advising your Lordships to overrule them were it not that the eminent judges who were responsible for the later decisions purported only to follow the earlier decisions, and in some cases with expressions of doubt or dissent. Instances of such dissent are to be found in the judgment of Atkin L.J. in *Williams* v. *Minister of Munitions* (1) and in those of Scrutton L.J. in *Haydock* v. *Goodier* (2) and in the present case. Further, in a series of cases which came before the Court of Session in Scotland, of which *Baird & Co.* v. *Ancient Order of Foresters* (3) is an instance, the law was decided or assumed to be the other way. Having regard to this conflict of opinion and decision, it is plainly desirable that the provisions of the statute should be construed by your Lordships' House without undue regard to previous decisions of the Courts; and it appears to me that, if your Lordships should agree in the conclusions which I have expressed, effect should be given to them.

It has been suggested that it might be injurious to a workman if he were held incapable of accepting a lump sum in satisfaction of his claims under the Act, as the receipt of a lump sum, which might be invested in a business for his benefit, might be more advantageous to him than a weekly payment. But, in fact, there is nothing in the statute, as I have construed it, to prevent such a transaction. It will still be open to a workman to agree with his employer for the payment to him of a lump sum in commutation of his right to a weekly payment under the Act, and the only difference will be that the agreement will be subject (at little or no cost to him) to the criticism and approval of the county court. In any case, this appears to me to have been the intention of Parliament as expressed in the statute.

For the above reasons I am of opinion that this appeal should succeed, that the judgment of the Court of Appeal should be set aside and the decisions of the county court judge restored, and that the respondent should pay the costs of the appellant in the Court of Appeal and in this House.

(1) 12 B. W. C. C. 213.
(2) [1921] 2 K. B. 384; 14 B. W. C. C. 50.
(3) 1914 S. C. 965.

My Lords, my noble and learned friend Lord Buckmaster desires me to say that he concurs in this judgment.

LORD DUNEDIN (read by LORD SHAW OF DUNFERMLINE). My Lords, the appellant was a workman in the service of the respondent. On October 20, 1920, he met with an accident arising out of and in the course of his employment. The respondent thereafter until June, 1921, paid the appellant the sum of 35*s.* per week, which was the maximum sum to which he was entitled as compensation under the Workmen's Compensation Act. In June, 1921, the representative of an insurance company who had insured the respondent's liability had two interviews with the appellant, and informed him that in view of a medical report which they had got the company could not continue to pay him the full compensation, and made him an offer of 75*l.* in settlement of all claims. This the appellant, who was without independent advice, accepted, and on June 20, 1921, the respondent forwarded to the registrar of the county court a memorandum of the said agreement in the following terms: "The said Henry Russell agrees to accept and the said George Rudd agrees to pay the sum of 75*l.* (seventy-five pounds) in full settlement and discharge of all claims in respect of the aforementioned accident"; and requested the registrar to record the same. The registrar, after giving notice to the appellant of this request, refused to record the memorandum on the ground of the inadequacy of the sum therein mentioned, and referred the matter to the county court judge, as prescribed by s. 9 (*d*) of the Second Schedule of the Act. The respondent continued the payment of 35*s.* up to August 13, 1921, but then ceased, maintaining that the matter was concluded by the settlement above mentioned. The appellant did not accept payment of the 75*l.*, but on September 12 filed a request for arbitration. The respondent filed an answer setting forth the settlement. The application to record and the application for arbitration came before the county court judge on November 1, 1921, and evidence was led before him. The county court judge found as a fact that the agreement was an agreement as to

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a redemption of a weekly payment, that the sum of 75*l.* was inadequate, and refused to record the memorandum; and in the arbitration proceedings he found the appellant entitled to 13*s.* 6*d.* a week from August 24, 1921. An appeal was taken to the Court of Appeal. The Court of Appeal held themselves bound by former decisions in the Court of Appeal, which had settled that there could be no redemption of a weekly payment unless such weekly payment had been de facto fixed either by agreement or by arbitration. They further held that on the facts there had been no such fixing of a weekly payment, but only a tender of a lump sum; that accordingly the agreement did not fall within the words of s. 9 (*d*) of the Second Schedule and could not be objected to by the registrar and the county court judge on the ground of inadequacy. They thereupon recalled the judgment of the county court judge and ordered the memorandum to be recorded.

My Lords, I may say at once that so far as their view of the facts is concerned, I agree with the learned judges of the Court of Appeal and not with the county court judge; the law being, as it stood, binding on the county court judge and the Court of Appeal. I think it impossible to say that there was here any fixed weekly payment which had been settled by agreement or arbitration, and which as such was capable of redemption. I do not think it necessary to analyse the evidence; for the fact itself becomes immaterial in the view I take of the law of the case. The broad and important question raised is this: Given a settlement come to between employer and workman in which a lump sum is tendered and accepted as in full settlement of all claims for compensation in respect of an accident arising out of and in the course of employment, what would be the effect thereof if nothing more were done; and, second, what is the effect if a memorandum of the settlement is proffered for recording?

Now, s. 1 of the Act provides absolutely that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman the employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First

Schedule. Turning to the First Schedule, we find that the compensation to be paid is, in the case of a workman killed, a lump sum to his dependants; in the case of a workman injured, but still living, a weekly payment during total or partial incapacity. Then, s. 3 of the Act, after providing for the allowance of a scheme of compensation approved of by the Registrar of Friendly Societies (the non-existence of such a scheme I take as a hypothesis to the settlement indicated), goes on to say that if the scheme is approved the employer shall only be liable as under the said scheme, but "save as aforesaid the Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The effect of this section seems to me plain. The right of an injured workman (I assume the fact as to his injury arising out of and in the course of employment) to a weekly payment is absolute and cannot be got rid of except in so far as the Act allows. It follows, therefore, that a contract which purports to take away that weekly payment is bad, so that in the case first put the workman could go on to claim the weekly payment by arbitration and could not be stopped by virtue of the contract alleged.

The Act, however, does not leave the matter standing to this effect, that a weekly payment can never be got rid of. The weekly payment itself as to amount is in terms of s. 1, sub-s. 3, to be settled either by agreement or by arbitration, in accordance with the Second Schedule of the Act. A memorandum of the terms of such a settlement, whether made by arbitration or by agreement, is in terms of s. 9 of the Second Schedule to be made and sent to the registrar of the county court to be recorded, and it then becomes enforceable as a county court judgment. Any weekly payment may be reviewed at the request of either party, and failing agreement the new sum must be settled by arbitration (Sch. I., 16), and on such review may be ended, diminished or increased. When the weekly payment has been continued for not less than six months, the employer may apply to have it redeemed by payment of a lump sum; and, in addition, agreements to redeem by a lump sum are authorized (Sch. I., s. 17). Such

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agreements must be embodied in a memorandum and recorded. The opening words of Sch. II., s. 9, make this clear: "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, a memorandum thereof shall be sent . . . . ," etc. If they are not, then Sch. II., 10, provides that the liability to make compensation still exists, even if the lump sum has been paid. Then, further, by Sch. II., s. 9 (*d*), it is provided that "Where it appears to the Registrar of the County Court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . . ought not to be registered by reason of the inadequacy of the sum . . . . he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the Judge."

Taking all these sections together, I confess I think that the result is clear and may be summed up in the following propositions: (1.) The compensation which in the case of an accident arising out of and in the course of employment the workman is entitled to is, in the case of a living workman, a weekly payment. (2.) Any agreement whereby the workman gives up his right to apply for and get that weekly payment is void. (3.) A weekly payment may be redeemed by a lump sum. (4.) It follows that when a lump sum is agreed on in settlement of all claims afterwards, it must either be a redemption of a weekly payment or a void agreement. (5.) If it is a redemption of a weekly payment, Sch. II., 9 (*d*), applies in terms and submits the adequacy to the consideration of the registrar and after him to the judge before recording the memorandum setting forth the settlement. (6.) Recording is the only method by which future liability can be avoided.

My Lords, I am now bound to consider the cases decided in the Court of Appeal by which the Court in this case was undoubtedly bound, though I do not think it doubtful that the true opinion of Scrutton L.J. at least was not in accordance with the cases. The first case that is usually cited is *Fox* v.

Battersea Borough Council (1), and undoubtedly it is in subsequent cases treated as the parent authority, but it does not really raise the point. A workman met with an accident in respect of which he eventually became totally incapacitated. Negotiations ensued, and eventually a formal agreement in May, 1909, was entered into by which he accepted a weekly payment of half wages. In April, 1910, he commenced proceedings for arbitration. In May, 1910, the employers applied for an order to record the memorandum of the agreement of 1909. This was objected to by the workman on the ground that the agreement was not genuine. The county court judge held that the memorandum was not genuine as that word is used in Sch. II., 9; refused to record, and awarded compensation. The Court of Appeal reversed, held that there was no evidence as to non-genuineness, and ordered the memorandum to be recorded. It will be at once observed that no question was raised, or indeed, could be raised, as to Sch. II., 9 (*d*), nor any question as to whether in the face of an agreement to pay so much a week the workman could not apply for a revision under Sch. I., 16. It really seems to have been assumed rather than argued that once the memorandum was recorded all other proceedings came to an end. Then comes the case of *Ryan* v. *Hartley*. (2) This decided that an agreement to take a sum in full settlement of all claims precluded arbitration, but unfortunately not a single word is said in argument or judgment as to the effect of s. 3, sub-s. 1, of the Act, an omission which I humbly think makes the judgment worthless. The next is the case of *Rawlings* (3), and here for the first time the question is directly raised as to the registrar's power to pronounce on inadequacy when a lump sum agreement is tendered to be recorded. It was held that unless a weekly payment has been actually fixed or agreed on, a lump sum agreement could not be an agreement to redeem a weekly payment, and that consequently a registrar has no powers. Here again no notice is taken at all of the dilemma presented by s. 3, sub-s. 1. Then comes

(1) 4 B. W. C. C. 261. (2) [1912] 2 K. B. 150.
(3) 11 B. W. C. C. 73.

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Williams v. *Minister of Munitions.* (1) This was a case of payment of a lump sum in full of all claims. It is sufficient to quote a sentence from the judgment of Atkin L.J.: "I understand that Mr. Lowenthal raised before us, and raised for the purpose of reserving it for a higher tribunal the important point which I understand to be this, that a valid agreement cannot be made in discharge of all liabilities under the Act except under the provisions of Schedule I. (17.), dealing with the redemption of weekly payments subject to the protection given by Schedule II. (9.) I understand Mr. Lowenthal to admit that that was a point which was not open in this Court under decisions which have been already given in this Court. If he did so admit I think he was right because I do not think the point is open to us. I do not think that the decision of the House of Lords given in *Clawley* v. *Carlton Main Colliery Co.* (2) was intended to overrule the decision in *Ryan* v. *Hartley* (3) and *Rawlings, Ld.* v. *Hodgson.* (4)" As regards the remark about *Clawley's Case*, it is clear the point was quite different. The employer had made a settlement under which he promised to give the man a house and, in addition, light work and a compensation payment of 8*s.* 10*d.* The point decided is accurately put in the headnote: "The employer is not entitled under" para. 17 of Sch. I. "to redeem a weekly payment which does not represent the full compensation payable under the Act." There was therefore no occasion to consider or review the cases of *Ryan*, etc., none of which so far as appears by the report seem to have been quoted in the argument. Lastly came the case of *Haydock* v. *Goodier.* (5) There the point is made and held as settled, as indeed it was by the prior decisions. There is, however, an elaborate judgment of Scrutton L.J., which, referring to the decisions of *Ryan*, etc., has this pregnant sentence: "I do not propose to say what I should have thought but for the decisions of the Court of Appeal, except that it is very likely I should have gone wrong." He then points out that under the old

(1) 12 B. W. C. C. 213, 223.
(2) [1918] A. C. 744.
(3) [1912] 2 K. B. 150.
(4) 11 B. W. C. C. 73.
(5) [1921] 2 K. B. 384, 398.

Employers' Liability Act, which had no equivalent to s. 3, sub-s. 1, it had been held in *Griffiths* v. *Earl of Dudley* (1) that a workman could contract out of the Act, and that in his view s. 3, sub-s. 1, of this Act was inserted to meet that decision. He points out that in none of the decisions is s. 3, sub-s. 1, examined, but he holds, quite rightly, that none the less these decisions bind him.

My Lords, these decisions do not bind your Lordships, and I think they are wrong. If I may venture the expression, I think the Court of Appeal in the past tumbled into the present state of authority without adequate consideration being given to the actual words of the statute.

My Lords, it may not be out of place for me to say that I have carefully examined the Scotch cases with which the learned counsel at the Bar have no undue familiarity, as they cited none. I find that although the point has never been argued, and then decided, it has been assumed to be resolvable in the way I have expressed. In the case of *Burns* v. *Baird & Co.* (2) in the Second Division, and again in the case of *Baird & Co.* v. *Ancient Order of Foresters* (3) in the First Division, memorandums of lump sums agreed on as in satisfaction of all claims, no weekly payments having been made, were presented for recording and the adequacy was held examinable by the sheriff-clerk, who takes the place of the registrar in England. Since the point was not argued, I cannot say it was decided, but at least I can say that the instincts in Scotland were, according to my judgment, right. I am of opinion accordingly that the appeal should be allowed and the judgment of the county court judge restored.

LORD SHAW OF DUNFERMLINE. My Lords, so fully do I agree with the judgment of my noble and learned friend on the Woolsack, both in regard to the statement of facts and to the conspectus given of the provisions of the Act, that I hesitate to add anything. I only do so in case of any doubt being suggested on a proposition which I hold to be

(1) (1882) 9 Q. B. D. 357. (2) 1913 S. C. 358.
(3) 1914 S. C. 965.

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unquestionable. That proposition is this: There may be an agreement between an employer and workman for redemption of a weekly payment, not only in the case where there had first been an agreed-on weekly payment prior to the redemption, but also in the case where there was simply the liability under the statute to make a weekly payment.

With much respect to the judges who decided the case of *Ryan* (1), and in full knowledge that that decision has been followed by those of *Hudson* (2), *Rawlings* (3), *Williams* (4), and *Haydock* (5), as well as in the present case, I am not myself able to apply the word "redemption" in any more limited sense. In particular the judgment of the Court of Appeal in *Rawlings*, which specifically ruled that a registrar had no power to inquire into the adequacy of the lump sum agreed upon, unless there had first been an ascertainment in fact of a weekly payment, proceeded, in my humble opinion, upon an erroneous construction of the statute, and the sequence of cases in that sense must now be also pronounced erroneous.

Redemption simply means commutation. (1.) The statute starts with the fact of liability to make a weekly payment as the one outstanding fact. And (2.) it shows by repeated provisions much care in securing that the amounts to be paid to the workmen shall be subject to scrutiny as to the bargain being not only untainted by fraud but being also adequate in amount. These protective provisions are equally outstanding. Unless this protective provision as to declinature to record a redemptive agreement for an inadequate amount be given effect to in circumstances such as those of the present case, the Act is pro tanto defeated; its protections fail.

I repeat, redemption is simply commutation, and the commutation is commutation, into one sum, of the sums which would otherwise, on a calculation of the liability, have been periodically due to the workman. Redemption,

(1) [1912] 2 K. B. 150.
(2) 10 B. W. C. C. 400.
(3) 11 B. W. C. C. 73.
(4) 12 B. W. C. C. 213.
(5) [1921] 2 K. B. 384.

by its very nature, points to the future, and it is liability for the future which is the essential thing which has to be compounded or commuted. The case may be easily figured of a worker to whom a capital grant would be more advantageous than a weekly payment. The chance may thereby be furnished of placing him in a way of life where his livelihood will be secured if only the sum be paid at once, and even before weekly payments are made or settled. To such a case the use of the expression "an agreement for redemption of a weekly payment by a lump sum" is perfectly applicable, and that is the very case (Sch. II. 9 (*d*)), where scrutiny as to adequacy is provided for. The Act does not say "weekly payment which has already been fixed" or "paid" or "agreed upon"; and, in my view, weekly payment means comprehensively a weekly payment for which under the Act the employer is liable.

Furthermore, it is just in such a case that the beneficent protective provisions of the Act can be possibly more usefully invoked than in the fixation of a weekly payment, as the transaction may involve more or less complex actuarial elements.

Your Lordships are all agreed that this workman did commute, compound or redeem for an inadequate sum—i.e., 75*l.*—the weekly payment to which he was entitled. The registrar properly refused to record it, and the learned county court judge, agreeing on the point of inadequacy, also refused to record it. Following the course of decisions in England to which I have referred, the learned judges of the Court of Appeal have held that this was wrong. In the state of the decisions, they could not avoid this result, although it is not surprising that more than one of their number were conscious of, to say the least, much personal hesitation on the merits of the point.

In Scotland two cases have arisen in which there was an agreement as to the redemption of the weekly payment of compensation in circumstances such as the present, that is to say, where no agreement as to the amount of the weekly payment had been previously made. These cases were

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Burns v. *Baird & Co.* (1), decided in the Second Division, and *Baird & Co.* v. *Ancient Order of Foresters* (2), decided in the First Division. In both cases points of procedure arose, and the decisions took place upon them. But the minutely and carefully discussed objections to procedure took no stock of any radical illegality which would have—if the English decisions referred to were sound—underlain the agreements themselves. The learned judges of these divisions clearly assumed, as I think they were entitled to do, that the redemption of a weekly payment could be made at any time, and that having been made, in the sense of a commutation of liability for a weekly payment, such an agreement fell under the protective provisions of the statute. The Lord President, in an opinion with which I entirely agree, said this : "I am of opinion . . . . that the case must go back to the sheriff-clerk in order that he may receive and consider any information which is tendered to him by the approved society" (a society to which the insured workman belonged and which obtained a locus standi in such cases under the provisions of the National Insurance Act of 1911). "If he in his discretion thinks the information so tendered is sufficient, then he himself must prepare a minute setting forth the grounds of his action, and lay that minute before the arbitrator, whose duty it will then be to proceed exactly as if the memorandum of agreement were an arbitration, and consider the question raised in the sheriff-clerk's minute, and pronounce such order as in the circumstances he shall think just."

It appears to me to be clear that the assumption throughout is that the transaction of redemption—of the same kind there as here—fell properly to be recorded under the statute, and was not, by its nature, excluded from the statutory provisions on that head. In my humble opinion this assumption was entirely sound in law.

LORD CARSON. My Lords, it is not suggested that the agreement of June 20, 1921, was open to any objection on

(1) 1913 S. C. 358. (2) 1914 S. C. 965, 972.

the grounds of its "genuineness," Sch. II. (9.), or on the ground of duress, fraud or mistake or the like. As the Master of the Rolls states in his judgment: "It is plain and simple on the face of it that it is in discharge of all claims, and the applicant in his evidence said: 'I presumed the 75*l.* was to settle everything; I agreed to accept it to settle everything.' The learned County Court Judge found on looking at the surrounding circumstances, that it was not an agreement to settle all claims. How he has arrived at that conclusion upon the wording of the document and the evidence of the applicant, I do not understand, but he has. I think such a finding cannot possibly stand in the face of the evidence of the document itself."

I agree with the Master of the Rolls.

The broad question, therefore, raised in this appeal, and one of the first importance, is whether such an agreement is under the Act of Parliament a valid agreement, or in other words whether it is competent for the workman and the employer to settle or compromise a claim by the payment of a lump sum. If the answer is in the negative one of the results will be that it will not be possible in any case, however doubtful or raising any of the difficult questions which so often arise as to whether, for example, the workman is entitled to compensation under the Act, for the employer and the workman to agree to a settlement of the disputed points by payment of a lump sum, and the parties, however willing they may be to agree, or however beneficial the agreement may be, will be left to litigate such disputed questions in accordance with the procedure laid down by the Workmen's Compensation Act.

When we recollect the innumerable questions which arise from day to day such as what is an "accident"? has the injury arisen out of and in the course of his employment? and many others with which we are so familiar, I cannot but think that we ought not to come to such a conclusion unless we find clear words in the Act of Parliament taking away the inherent right of compromising legal claims.

It is not disputed that since the Act of 1906 was passed, in this country at all events, it was settled by a series of authorities

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—some in the Court of Appeal—that such an agreement was valid, and there can be no doubt that hitherto a great number of cases must have been settled or compromised on this view of the law. None of these cases has ever been impeached in your Lordships' House until now, and we are asked in the present case to overrule them, as we have undoubtedly the right and the power to do, if, in our opinion, they were wrongly decided. Some of these cases have been already referred to in the speeches of noble and learned Lords who have preceded me, and I need only refer to them very briefly.

Ryan v. *Hartley* (1) decided that an agreement to accept a lump sum in full settlement of all claims was valid and precluded any subsequent proceedings. This case was decided by the then Master of the Rolls (afterwards Lord Cozens-Hardy), Fletcher Moulton L.J. (afterwards Lord Moulton), and Buckley L.J. (now Lord Wrenbury)—judges, I need hardly say, of the highest eminence and authority. My noble and learned friend, Lord Dunedin, says: "But, unfortunately, not a single word is said in argument or judgment as to the effect of section 3 (1.) of the Act, an omission which I humbly think makes the judgment worthless." With that point I shall deal later, but I would like to point out that in a subsequent case in the Court of Appeal, *Hudson* v. *Camberwell Borough Council* (2), in which Lord Cozens-Hardy M.R. was again the presiding judge, the point as to s. 3, sub-s. 1, was decided by the county court judge, and specifically raised before the Court of Appeal, the other judges being Warrington L.J. and Lawrence J. (now Lord Trevethin), and, so far as I can see, no doubt was thrown on the authority of *Ryan* v. *Hartley*. (1) Again in *Rawlings, Ld.* v. *Hodgson* (3), the Court of Appeal (consisting of Swinfen Eady M.R., afterwards Lord Swinfen, Bankes L.J. and Neville J.) came to the same conclusion, and, so far from throwing any doubt upon the previous decisions, I find Bankes L.J. used the following language: "I am all the more glad to be able to come to this conclusion, because I am satisfied that it never was intended

(1) [1912] 2 K. B. 150.
(2) 86 L. J. (K. B.) 558; 10 B. W. C. C. 400.
(3) 11 B. W. C. C. 73, 84.

that the Registrar should have a kind of prying jurisdiction into a case where the workman himself, who is being independently advised by a firm of competent solicitors, has come to the conclusion, as his advisers have come to the conclusion, that the sum which is offered to him, and which he has accepted, is adequate and sufficient."

It is to be noted with reference to this decision that if s. 3, sub-s. 1, invalidates the agreement, the fact that the workman was independently advised would make no difference.

My Lords, when it is said that these authorities are "worthless" because s. 3, sub-s. 1, was not considered, with great respect to my noble friend, I hardly think we do justice to the eminent judges who decided these cases in supposing that this point was overlooked. I have already pointed out that in one of the cases the point was specifically referred to, but I would like also to refer to the reasons suggested by the present Master of the Rolls in *Haydock* v. *Goodier* (1) as to why importance may not have been attached to this section and which are well worthy of consideration. He says: "The only thing that was said in derogation of these cases which decide that an agreement can be made, was that they do not refer to s. 3 of the Act of 1906, which deals with what is called 'contracting out.' I do not think the fact that that section was not referred to, even if it applies, is any ground on which we can disregard the authorities. They are there. I will only say this, that, to my mind, it is by no means clear that the section has any application. I do not say that it has not, as it is not necessary to decide that point. I think, however, it may very well not have been referred to for the reason that it was taken to apply to an agreement to exclude a scheme other than an approved scheme, by which the employer and the workman undertook to carry on their relations outside the provisions of this Act altogether, and without giving to the workman the additional right of compensation which is contained in this Act; that is to say, to leave him, in the case of any accident, subject to the liability of having to prove, in order to get compensation, that either the employer

(1) [1921] 2 K. B. 384, 386, 395, 401–2.

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himself at common law, or somebody under the authority of the employer under the Employers' Liability Act, had been negligent, and that it was not intended to prevent a contract by which, admitting that the provisions of the Act apply, the parties agree to compromise a possible liability under the Act. That may be the reason why the section was not referred to, but whether that be so or not, there is the decision."

My Lords, turning to the Act itself I can find no sufficient reason for disagreeing with these authorities. As I understand the argument, it is shortly this: the compensation for which an employer is liable must be in accordance with the First Schedule, and that Schedule, in the case of a workman injured, but still living, provides a weekly payment during total or partial incapacity. It is argued, therefore, that to contract to accept a lump sum is contracting out of the Act, which is prohibited under s. 3, sub-s. 1, unless in the case of a scheme authorized under that section.

My Lords, I cannot myself agree with that argument. There is, in my opinion, no contracting out of the Act so long as the workman had behind him the leverage supplied by the terms of the Act in arranging a settlement, and can, if a satisfactory settlement is not agreed to, fall back upon the procedure under the Act. "Compromising a claim under the Act is not contracting out of it": per Younger L.J. in *Haydock* v. *Goodier*. (1) "Here there is an agreement by which these persons did contract themselves, not out of the Act, but out of any further proceedings as to liability under the Act": per Lord Sterndale M.R. in the same case.

My Lords, I have already said we ought not to interfere with the inherent right of settling or compromising claims unless we find clear words taking away that right. I do not myself find any such words, and I entirely agree with what was said by Younger L.J. upon this point in *Haydock* v. *Goodier*: "I must not be taken as at present advised to give any encouragement to the view that apart from these judgments" (i.e., the judgments to which I have already referred) "an agreement—not of course open to objection

(1) [1921] 2 K. B. 384, 386, 395, 401-2.

on the ground of duress, fraud, mistake or the like—to compromise a disputed claim under the Act is prohibited by the fact of its being entered into by a workman of full age. My view is that the power to compromise their disputes being inherent in all persons of full contractual capacity, that power is not in any particular case to be regarded as taken away by any other than very plain statutory words, words which I have not myself hitherto found in this statute."

That the Act does allow of a settlement by agreement as to the payment of a weekly sum is not and cannot be disputed, and although there is provision for review of weekly payment (Sch. I. (16.)) no such review can be entertained unless there has been a change in the circumstances of the case since the weekly payments were fixed: *Scott* v. *Long Meg Plaster Co.* (1)

It is also contended that the agreement in this case, if it is valid, must be considered as an "agreement as to the redemption of a weekly payment by a lump sum" within the meaning of Sch. I. (17.), and that, therefore, under Sch. II. (9.) (*d*) the registrar had power to inquire into the inadequacy of the sum agreed upon and to refuse to record the agreement and report the matter to the county court judge. We know, as a matter of fact, that the sum mentioned in the agreement had no reference to any weekly payment; as Warrington L.J. said: "We have nothing except the bare fact that from the date of the accident to the time of making the agreement the employer had paid the full amount which the workman could have recovered as compensation if he had insisted on his legal right. I agree with the Master of the Rolls that it would be most mischievous to the workman especially but also to the employer if we were to hold that it was incompetent for the employer voluntarily to make a payment to the workman without at the same time being held thereafter by implication to have agreed to continue that payment, because of course in order that there may be an agreement of redemption by payment of a lump sum it must find weekly payments for the future in redemption

(1) 7 B. W. C. C. 502.

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of which the lump sum has been paid." My Lords, I agree with the decisions upon this point to be found in the cases of *Rawlings, Ld.* v. *Hodgson* (1); *Williams* v. *Minister of Munitions* (2); and *Haydock* v. *Goodier.* (3) When it is suggested that the proposed decision will not in effect interfere with a settlement between the employer and the workman for a lump sum because it could always be arranged on the basis of a commutation of a weekly payment, I would like to point out that not only does such a course necessitate litigation and a hearing, but it is apparent that such a settlement may very often involve other considerations than that of amount as the basis of the settlement agreed upon. I am, therefore, of opinion that this appeal fails on both points, and that (1.) the agreement is a valid agreement; and (2.) is not an agreement for the redemption of a weekly payment, and that the registrar was bound under Sch. II. (9.) on being satisfied as to its genuineness to record it in a special register.

My Lords, I am of course aware that having regard to the opinion expressed by your Lordships in the course of this debate, the views which I have put forward are of no importance, but I have thought it right to give my reasons for dissenting from the motion put from the Woolsack at some length out of respect for your Lordships and for the learned judges who have decided the cases already referred to and which this House has decided to overrule.

Order of the Court of Appeal reversed, and award of the county court judge restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the county court to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 20, 1923.

Solicitors for the appellant: *Kingsley Wood, Williams & Co.*
Solicitors for the respondent: *Hair & Co.*

(1) 11 B. W. C. C. 73. (2) 12 B. W. C. C. 213.
(3) [1921] 2 K. B. 384.

[HOUSE OF LORDS.]

M'DONALD . . . . . APPELLANT;

AND

SHAND . . . . . RESPONDENT.

H. L. (Sc.)*
1923
April 30.

Revenue—Income Tax—Office or Employment of Profit—Manager of Company—Commission on Profits—Whether assessable on Three Years' Average or on Receipts of Year of Assessment—"Perquisites"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sch. E, rr.* 1 *and* 4—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. E.*

The manager of a limited company was remunerated for his services by a fixed annual salary and a commission on the net profits of the company:—

Held, that the commission was assessable to income tax under Sch. E, not on the basis of the actual sum received as commission in the year of assessment, as provided by r. 1 of the Schedule, but on the basis of the average amounts in the three preceding years, as provided by r. 4.

Decision of the First Division of the Court of Session 1922 S. C. 555 affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland (1) affirming a determination of the Commissioners for the General Purposes of the Income Tax Acts for the Lower Division of Lanarkshire.

The respondent, who was formerly general manager of Nobel's Explosives Company, Ld., appealed against certain additional first assessments made upon him under Sch. E for the four years from 1914–15 to 1917–18.

The respondent was employed as general manager on the terms of an agreement dated August 18 and 19, 1914, clause 8 of which provided that the company should pay him in remuneration for his services under the agreement a fixed salary of 1500*l.* a year and in addition a bonus for each twelve months equal to $1\frac{1}{4}$ per cent. of the total revenue of the Nobel Dynamite Trust Company, Ld., provided that his total remuneration under this clause should not be less than 4000*l.*

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) 1922 S. C. 555.

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for each twelve months. In virtue of his employment under this agreement the respondent received during the years 1914 to 1917 a fixed salary and a commission or bonus on the company's net profits. During these years and for a series of years prior thereto he was assessed under Sch. E upon the amount of the salary received by him during the year of assessment, plus an amount equal to the average of the bonuses received by him during the three years immediately preceding the year of assessment. By the additional assessments appealed against it was proposed to assess both salary and bonus upon the amounts received or receivable by the respondent in respect of each year of assessment. The sole point at issue between the parties was whether the bonuses in question fell to be assessed under r. 1 or under r. 4 of s. 146 of the Income Tax Act, 1842, Sch. E.

The Commissioners allowed the appeal and discharged the additional assessments, and their determination was affirmed by the First Division (the Lord President, Lord Skerrington, and Lord Cullen).

Hon. Wm. Watson L.A. and *A. N. Skelton* (of the Scottish Bar) (*Sir Douglas Hogg A.-G.* and *Reginald Hills* with them) for the appellant. Rule 1 of Sch. E provides a general basis of charge and r. 4 provides an exception. In 1842, and still more in 1803, when these rules were first included in the Income Tax Act, perquisites attached to a number of public offices and took the form both of fees and emoluments actually payable in the course of executing an office and also of other rights and advantages. It is only to the former class that r. 4 applies. To fall within that rule the perquisite must be a payment which arises from something done in the execution of the office itself. The bonus or commission assessed in this case forms part of the ordinary annual remuneration of the respondent accruing by reason of his employment and is not a fee or emolument (which must be something ejusdem generis with fees) payable in the course of executing such employment. It does not depend upon the execution of the office or employment, but upon the general prosperity

of the company. It therefore does not fall within the exceptional character of perquisites as defined by r. 4.

Moncrieff K.C. and *Normand* (both of the Scottish Bar) for the respondent were not called on.

EARL OF BIRKENHEAD. My Lords, this is an appeal against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland on an appeal by Duncan M'Donald, His Majesty's Inspector of Taxes at Glasgow, under the Taxes Management Act, 1880, from the determination of the Commissioners for the General Purposes of the Income Tax Acts relative to assessments made upon the respondent under the provisions of those Acts.

At or before the hearing certain facts were admitted or were proved. The respondent, as general manager of Nobel's Explosives Company, Ld., under an agreement to which in a moment I will more particularly refer, received during the years 1914 to 1917 a fixed salary and commission or bonus on the company's revenue. During those years, and for a series of years prior thereto, he was assessed under Sch. E upon the amount of the salary received by him during the year of assessment, together with an amount equal to the average of the bonuses received by him during the three years preceding the year of assessment. Then additional assessments were made, which are the subject of the present appeal, under which it was proposed to assess both salary and bonus upon the amounts received or receivable by the respondent in respect of each year of assessment. Only one point, and that within the briefest possible compass, requires determination by your Lordships, and that is whether the bonuses under discussion are to be assessed under r. 1 or under r. 4 of s. 146 of the Income Tax Act. 1842, Sch. E. No dispute arises in relation to the figures.

It is convenient that I should call attention to the terms of the agreement between Nobel's Explosives Company, Ld., and Francis James Shand, dated August 18 and 19, 1914. The material clause is the eighth : " The company shall pay the said Francis James Shand, in remuneration for his services

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under this agreement, a fixed salary at the rate of fifteen hundred pounds per annum, and in addition a bonus for each twelve months equal to one and a quarter per cent. of the total revenue of the Nobel Dynamite Trust Company Ld. of London as shewn by the addition on the credit side of the published profit and loss account of that company, provided that the total remuneration payable to the said Francis James Shand under this clause shall not be less than at the rate of four thousand pounds for each period of twelve calendar months." The result of this eighth clause of the agreement is that a guaranteed minimum sum of 4000*l.* a year shall in any event be paid to Francis James Shand, but there is a possibility depending upon the revenue of the company that by the operation of the bonus the total moneys payable to him will exceed the sum of 4000*l.* a year.

It is next convenient to examine shortly the terms of the rules under Sch. E. I will first read the material words in the first rule, the contention of the Crown of course being that this case is governed by the words of that rule: "The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule (E.), or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and *bona fide* paid and borne by the party to be charged; and each assessment in respect of such offices or employments shall be in force for one whole year, and shall be levied for such year without any new assessment," and then follow words with which we are not so closely concerned. The fourth rule is the following: "The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject, in the course of executing such offices or employments, and may be estimated

either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding; such years in each case respectively ending on the fifth day of April in each year, or such other day of each year on which the accounts of such profits have been usually made up."

The first observation which I think falls to be made is that in construing r. 4 one must bear in mind that the Legislature had already placed on record r. 1; in other words, when they deal with "perquisites" in r. 4 it is to be assumed that they had in their minds the provisions of r. 1 and intended in the language which they employed in r. 4 to provide for a distinguishable and, indeed, for an already distinguished case. Bearing that observation in mind, what conclusion is to be drawn? It is, I think, evident that the scheme of the first and fourth rules of s. 146 is that fixed emoluments, such as salary, shall be assessed on the basis of the sum receivable during the year of assessment, but that profits which vary from year to year shall be assessed by way of estimate, at the recipient's option, either on the profits of the preceding year or on the fair average of one year of the amount of the profits in the three years preceding. The first rule is intended, as I read it, to define the extent of the charge, and it accordingly uses wide words in order to bring within the charge all profits whatsoever accruing by reason of the office. The object of the fourth rule, on the contrary, is to deal in a more specific manner with profits which vary, and here the important words from the point of view of the subject matter of the present appeal are those which supply the definition of "perquisites." It is at first sight not altogether easy to see what in the definition of "perquisites" in the fourth rule is added to the definition of "perquisites" in the first rule; but the words about which an observation falls to be made in the definition of "perquisites" in the later rule are "such profits of offices and employments as arise from fees or other emoluments, and payable in the course of executing such offices or employments." My Lords, what is the purpose of the definition? It surely must be to ascertain what are the

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profits which are to be assessed either by reference to the receipts of the year preceding the year of assessment, or by reference to the average of the three preceding years. The words that are used are "such profits of offices and employments as arise from fees or other emoluments."

Is it possible to contend with success that a bonus payable under the circumstances provided for by the clause of the agreement I have read is not a "perquisite" in the sense in which "perquisite" is explained by the words that follow it in r. 4 ? Infinite disputation is possible as to what, in different contexts, may be the proper connotation of a term such as "perquisite." In one context it may have a bad or an irregular connotation ; in another it may be normally ranged under payments which are both frequent and regular in commercial transactions. I am to put a meaning upon "perquisites" in the context of the rule, and I derive no small degree of guidance from the words which follow, to which I have directed attention : "such profits of offices and employments as arise from fees or other emoluments." The Lord Advocate, in his clear argument, says that I am to read "emoluments" as being ejusdem generis with "fees." Be it so. With what am I to read "fees" as being ejusdem generis ? What definition of the term "fee" am I to adopt which would exclude a payment by way of bonus such as that which is stipulated for under clause 8 of this agreement ?

My Lords, for these reasons, in a case which seems to me to be very clear, I reach the conclusion that the decision of the Commissioners was right and ought to be affirmed and that this appeal should be dismissed, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, I am of the same opinion. Under the first rule certain duties are imposed "for all salaries, fees, wages, perquisites, or profits whatsoever" arising from certain offices, employments and pensions mentioned in the Schedule. Then the rule goes on to say that each assessment shall be in force for a whole year. In the enumeration in that rule you have "perquisites," and it seems

to have been considered desirable to define the word "perquisites." "Perquisite" is a word which may, according to the connection in which it is used, have a variety of different meanings, and a definition is given accordingly by r. 4, which, in some respects, may be taken as extending the meaning of the term "perquisites": "The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject, in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding." The first observation to be made, I think, on this rule is that the words "to be such profits as arise from fees" are clearly to be read with the words "in the course of executing such offices or employments." You have got words intervening referring to the question by whom the fees are to be paid, and saying it does not matter whether they are payable by the Crown or the subject. The profits are to be such profits as arise from fees or other emoluments in the course of executing such offices or employments. There is nothing that I can find there to denote that the fee or perquisite is to be payable on the doing of a particular act. In most cases I dare say it will be so, but it is quite enough if it is a payment which arises in the course of the employment.

The object of r. 4 was to deal with a case where, owing to the manner in which the charge was made, you could not say till the period had elapsed what the amount was, because, if a fee is to be charged either on doing a certain act or on the happening of a certain event, you cannot say until the period has run out how often that act has been done or how often that event has happened. For that reason r. 4 gives the definition, according to my reading of the rule, really with a view to the special provision which immediately follows as to the mode of assessment. It deals with the case of profits which could not in the nature of things be ascertained till the year runs out, and then, it says, they may be estimated either

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on the profits of the preceding year or on the fair and just average of one year of the amount of the profits thereof in the three years preceding.

My Lords, that seems to me to be the fair meaning of the rule, and I can entertain no doubt whatever that the decision of the Court below was right and this appeal should be dismissed.

Lord Dunedin. My Lords, I think this was a hopeless appeal, and I concur in the judgment proposed.

Lord Atkinson. My Lords, I concur.

Lord Shaw of Dunfermline. My Lords, I quite agree.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Agent for the appellant: *Solicitor for England of the Board of Inland Revenue, for the Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agents for the respondent: *Grahames & Co., for Moncrieff, Warren, Paterson & Co., Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS ;

AND

HAY AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)*
1923
March 16.

(S.S. THE COUNTESS—LIMITATION.)

MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS ;

AND

HAY AND OTHERS . . . . . RESPONDENTS.

(S.S. THE COUNTESS—DETINUE.)

Shipping—Collision—Docks and Ports—Collision with Dock Gates—Dock-owners' Rights of Detention—Statutory Powers of the Mersey Docks and Harbour Board—Limitation of Liability—Rateable Distribution—Priorities—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act*, 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3.

By the Mersey Dock Acts Consolidation Act, 1858, s. XCIV., when damage is done to any lock or other work of the Mersey Docks and Harbour Board through the negligence of those on board of any vessel the vessel may be detained until such damage is paid or a deposit is made of the amount claimed by the Board, which deposit the Board are authorized to retain until the whole amount of the damage shall have been ascertained and paid, and provision is made for the application of the deposit in satisfaction of the claim.

The Merchant Shipping Act, 1894 (s. 503), limits the liability of shipowners where, without their actual fault or privity, loss or damage is caused to any other vessel by the improper navigation of the ship to 8*l.* per ton; and (s. 504) provides that in the case of several claims the owner of the ship which has caused the damage may apply to the High Court "and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants."

The Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1, extends the limitation of liability set by s. 503 of the Act of 1894 to all cases where, without the actual fault or privity of the shipowners, loss or damage is caused to property of any kind, whether on land or on water, by the improper navigation of the ship.

The steamship *Countess*, which was lying in a dock belonging to the

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* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE.

H. L. (E.)
1923
MERSEY DOCKS AND HARBOUR BOARD v. HAY.

Board, negligently went ahead instead of astern and crashed through the dock gates into the river, carrying with her a number of barges, some of which were sunk. The *Countess* was holed and had to be beached, and, the Board's assistant marine surveyor having certified that she was a danger to the safe navigation of the port, the Board took charge of her under the powers of the Mersey Docks and Harbour Act, 1912, and repaired her at a cost of 1000*l.* The damage done to the Board's dock amounted to 10,000*l.* and the damage done to the barges to 55,000*l.* The statutory amount of the *Countess's* liability under the Merchant Shipping Acts at 8*l.* per ton was 4468*l.* The Board detained the *Countess* under their statutory powers in respect of the damage done to the dock. Numerous actions having been commenced by the barge owners, the shipowners commenced a limitation action in which they claimed to limit their liability to the amount ascertained under the Merchant Shipping Acts and to have that amount distributed rateably among the claimants, and in that action an order was made staying the bargeowners' actions. They also commenced an action against the Board for delivery up of the vessel and damages for detention. Ultimately the vessel was released on payment by the shipowners into Court of 5500*l.*, representing (1.) the statutory amount of their liability, and (2.) the expenses incurred by the Board in connection with the repair and detention of the vessel. No question arose as to the latter sum. The Board claimed payment of their claim for damages (up to the limit of the shipowners' statutory liability) out of the fund in Court in priority to the claims of the bargeowners by virtue of their right to detain the vessel (and the sum representing the vessel) under their private Act of 1858. The bargeowners claimed that the fund ought to be distributed rateably among the several claimants, including the Board, according to the amounts of their claims:—

Held (by Earl of Birkenhead, Viscount Finlay and Lord Atkinson; Lord Sumner and Lord Phillimore dissenting), (1.) that the exercise by the Board of their statutory power to detain the ship conferred on them a possessory lien; (2.) that the Act of 1900 (s. 1 of which impliedly incorporated s. 504 of the Act of 1894) neither expressly nor by implication affected the lien of the Board, beyond limiting the amount for which the lien could be exercised; (3.) that the Court, in distributing the statutory amount of the shipowners' liability rateably among the claimants, ought to have regard to the priorities as well as to the amounts of the claims; (4.) that, consequently, the whole of the fund should be paid out to the Board.

Leycester v. *Logan* (1857) 3 K. & J. 446 and *The Emilie Millon* [1905] 2 K. B. 817 discussed.

Decision of the Court of Appeal [1922] P. 41 reversed.

APPEALS from a decision of the Court of Appeal (1) affirming (with a variation) a decision of the President. (2)

The facts are fully stated in the report of the case before the Court of Appeal and also in the judgment of the

(1) [1922] P. 41. (2) [1921] P. 279.

Earl of Birkenhead; and they are summarized in the headnote.

1922. Dec. 7, 8. *G. J. Talbot K.C.* (with him *Greaves Lord K.C.* and *Stewart Brown*) for the appellants. There is nothing either express or implied in any of the legislation subsequent to the appellants' private Act of 1858 to deprive them of their paramount statutory rights under s. XCIV. of that Act to detain the *Countess* (or the money representing her) until payment of the damage done to the dock gates, subject only to the limitation of the amount payable by the shipowner for such damage introduced by the Merchant Shipping Act, 1900. The authority to the Court in s. 504 of the Merchant Shipping Act, 1894, to determine the amount of the owner's liability and to distribute that amount rateably among the several claimants cannot operate to destroy a priority or a statutory right: *The Emilie Millon.* (1) Moreover, the words of the Act are permissive only. "May distribute rateably" does not mean that in every case the Court is bound to distribute pari passu without regard to the legal rights of the claimants. There are cases which decide that where the claimants start with equal rights a claimant who by diligence obtains a judgment does not thereby alter the mutual rights under the section as between himself and the other claimants: *Rankine* v. *Raschen* (2); *Jenkins* v. *Great Central Ry. Co.* (3); *Leycester* v. *Logan* (4); *The Victoria.* (5) Here the point is that the parties do not start with an equality of rights. The possessory lien of a dock owner differs from an ordinary maritime lien. Those decisions therefore do not touch this case. Further, s. 504 does not apply to this claim at all. Sect. 1 of the Merchant Shipping Act of 1900 extends the limitation of the shipowner's liability to cases of loss or damage caused to property or rights of any kind, whether on land or on water, but it does nothing more. Sect. 2 extends the benefit of limitation of liability to harbour authorities

(1) [1905] 2 K. B. 817.
(2) (1877) 4 R. 725, 728.
(3) Shipping Gazette, Jan. 13, 1912; cited in Halsbury's Laws of England, vol. XXVI., p. 614.
(4) 3 K. & J. 446.
(5) (1888) 13 P. D. 125, 127.

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where, without their actual fault or privity, damage is done to vessels within the area over which the authority exercises control, and by sub-s. 3 of that section s. 504 is expressly applied to the section as if the words "owner of a British or foreign ship" included a harbour authority. The express inclusion of s. 504 in s. 2 leads to the inference that it was not intended to be incorporated in s. 1.

Raeburn K.C. (with him *R. H. Balloch*) for the respondent bargeowners. The questions are (1.) whether the Board have any priority; (2.) whether the Court can give effect to that priority in the distribution of the limitation fund. As to (1.): The appellants admit that their right is cut down by the Act of 1900. They have a right to detain for the whole debt, but they cannot point to anything which entitles them to detain for the full amount of their liability up to 8*l.* per ton. As to (2.): It is said that "rateably" does not mean pari passu, but no case can be found in which any priority has been given to any claimant in the distribution of a limitation fund. Judgments in rem in respect of maritime liens rank in priority of date, but, nevertheless, in the distribution of a limitation fund all take pari passu.

Then it is said that s. 504 is limited to s. 2 of the Act of 1900, which deals with the liability of a dock company; but s. 504 necessarily applies to all the matters mentioned in the later Act. The reason for its express insertion in s. 2 is to meet the case of the new species of limitation of liability created by the Act of 1900. Lastly, it is said that s. 504 is merely permissive. It is submitted that, given the statutory conditions, the section forces the Court to determine the amount of liability and distribute that amount rateably. [He referred to *The Crathie.* (1)]

R. A. Wright K.C. (with him *A. T. Miller K.C.* and *Lewis Noad*) for the respondents, the owners of the *Countess.*

G. J. Talbot K.C. in reply cited *Julius* v. *Bishop of Oxford* (2) as to the operation of the word "may" in a statute.

The House took time for consideration.

(1) [1897] P. 178, 181.

(2) (1880) 5 App. Cas. 214, 235.

1923. March 16. EARL OF BIRKENHEAD. My Lords, these appeals are from the two orders of the Court of Appeal in England each dated December 20, 1921, affirming with variations decrees made by the President of the Probate, Divorce and Admiralty Division and dated March 23, 1921, in two actions brought by the respondent shipowners against the appellants.

The respondent shipowners are the owners of the steamship *Countess* which on June 5, 1920, was being navigated in the Alfred Dock at Birkenhead, one of the docks owned by the appellants. Owing to the negligence of those on board the vessel, she collided with the dock gates leading to the River Mersey and carried away part of the gates. The water in the dock being above the level of the river at the time, the vessel, together with a number of barges and like craft, was carried into the river, where a series of collisions took place; some eighteen or twenty barges were sunk or damaged; and the steamship *Countess* was holed. She was towed to and beached at Tranmere to save her from sinking. On that day the appellants' assistant marine surveyor formed the opinion that the vessel was or was likely to become an obstruction, impediment or danger to the convenient navigation or use of the Port of Liverpool and signed a certificate to that effect. The appellants took possession of the vessel, effected temporary repairs, and then towed her to a place of safety.

The owners of the vessel admitted negligence, which obviously was without their actual fault or privity. The damage done to the locks, gates, etc., of the appellants was estimated at 10,000*l*. The loss or damage caused to the barges and other craft (which included a barge belonging to the appellants) and their cargoes was about 55,000*l*. There was no loss of life.

The tonnage of the *Countess*, according to the Merchant Shipping Acts, was 558·83 tons, and the statutory amount of her liability at 8*l*. per ton was therefore 4468*l*. 4*s*. 9*d*. Her value at the date of these events was about 34,000*l*. The amount claimed for raising, removing and detaining the vessel

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is about 1000*l.*; but no question arises upon that matter in these appeals.

The Mersey Dock Acts Consolidation Act, 1858, s. XCIV., provides that, where damage is done to any lock, gate or other work of the appellants through the negligence of the master or any other person on board a vessel, the amount of the damage may be recovered from the master or owner summarily before a justice of the peace, or, at the appellants' option, the vessel may be detained until such damage is paid or a deposit is made of the amount claimed by the appellants. A deposit is to be deemed to have been paid in satisfaction unless notice of dispute is given within seven days. The appellants by letter of June 7, 1920, informed the respondent shipowners that they held them responsible for the damage and that the vessel was detained under the section.

Numerous actions against the respondent shipowners having been commenced by the bargeowners, these shipowners on June 14, 1920, commenced a limitation action in which they claimed to limit their liability to the amount ascertained under the Merchant Shipping Acts and to have the amount ascertained and distributed rateably among the claimants. The bargeowners' actions were thereafter stayed. In this limitation action the respondent shipowners applied by summons for an order releasing the vessel on payment into Court of the statutory amount of their liability. No order was made and an appeal was dismissed by Hill J. on July 12, 1920. On the same day the respondent shipowners issued a writ against the appellants claiming the delivery up of the vessel and damages for detention. In this detinue action they issued a summons for delivery up upon such terms as to payment into Court as might appear to the Court to be just, and eventually the Court of Appeal made an order under which on July 27, 1920, the respondent shipowners paid into Court 5500*l.*, and the vessel was delivered up to them. In this detinue action the appellants justified the detention under s. XCIV. of the Mersey Dock Act, 1858, and also under s. 7 of the Mersey Dock Act, 1912 (which authorizes them to raise and remove wrecks, etc.), and counterclaimed for declarations

as to their rights and to be paid out of the money lodged in Court the amount ascertained in the limitation action to be the liability of the vessel, or if no decree, the actual amount of the damage and also the expenses of raising and removing the vessel.

The two actions were tried together, and on March 23, 1921, the President held that the respondent shipowners were entitled to a decree in the limitation action; that until decree, the detention was justified; but that after decree the appellants had no priority over other claimants in the limitation fund which was to be distributed pari passu without regard to priorities. He held that the appellants were entitled to be repaid in full the cost of raising and removing the vessel. The balance of the money in Court after such repayment he ordered to be paid to the credit of the limitation action for distribution in the manner decreed by him.

The appellants appealed in both actions. The respondent shipowners appealed in the detinue action. These appeals were heard together, and on December 20, 1921, the decrees were affirmed with variations, the majority of the Court agreeing with the judgments of the President except that the appellants were held entitled to detain the ship until the rateable sum payable to them had been ascertained and paid. From these orders the appeals have been brought to your Lordships' House, where the bargeowners, who were not parties, have appeared craving leave to support the orders appealed against.

The Mersey Dock Acts Consolidation Act, 1858, s. XCIV., which was preceded by similar sections in two previous statutes relating to the appellants' undertaking or some parts thereof—namely, 51 Geo. 3, c. 143, s. LXXXVII., and the Liverpool Dock Act, 1855, s. XXIX., is in the following terms: "In every case in which any Damage shall be done to any Lock, Gate, Bridge, Pier, Landing Stage, Jetty, Platform, Quay, Wharf, Warehouse, Shed, Graving Dock, Graving Block, Building, or other Work belonging to the Board, through the Misconduct, Negligence, or Default of the Master of any Vessel, or any other Person on board of any Vessel, the Amount of such Damage

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may be recovered from such Master or the Owner of such Vessel before any Justice in a summary way, and in the same Manner as any Penalty is hereby made recoverable; or, at the Option of the Board, such Vessel may be detained until such Damage shall have been paid for or a Deposit shall have been made by the Master or Owner of such Vessel equal in Amount to the Claim or Demand made by the Board for the estimated Amount of Damage so done by such Vessel; which Deposit the Board are authorized to receive and to retain until the entire Amount of such Damage shall have been ascertained by the Board and paid to them by the Master or Owner of such Vessel, when the said Deposit shall be returned to him: Every such Deposit shall be considered to have been in Payment and Satisfaction of the Claim or Demand for Damage in respect of which such Deposit shall have been made, unless Notice that the Claim is disputed be given to the Board within Seven Days after such Deposit shall have been made; and after the Expiration of Seven Days next after such Deposit shall have been made (unless in the meantime Notice be given to the Board that the Claim is disputed), the Board may, unless the Amount of Damage done by such Vessel shall have been sooner paid, apply such Deposit or a sufficient Part thereof in making good such Damage, and shall return the Residue of such Deposit, if any, to the said Master or Owner."

There is a similar provision in s. 74 of the Harbour Docks and Piers Clauses Act, 1847.

The limitation of liability of shipowners was introduced into statute law many years ago as part of a deliberate policy, and appears in the now repealed Merchant Shipping Act, 1854, ss. 504, 506 and 514, whereby the liability of a shipowner in certain cases, when occurring without his actual fault or privity, is limited to the value of the ship and freight due or growing due in respect of the voyage in question, and provision is made for the owner to institute proceedings for the purpose of determining the amount of such liability among the claimants who duly prove their claims. The Amendment Act of 1862, s. 54, limited such liability in cases

to which such limitation applies to a tonnage rate of 8*l.* per ton where no loss of life was occasioned. The Act of 1894, consolidating and amending the previous Merchant Shipping Acts, provides by s. 503, sub-s. 1: "The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) . . . . (*d.*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts. . . . . (ii.) In respect of loss of, or damage to, vessels, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage." "(3.) The owner of every sea-going ship or share therein shall be liable in respect of every such . . . . loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen."

By s. 504: "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . . to the High Court . . . . and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just."

Under the 1894 Act, which, as I have said, incorporates the previous statutes, there is nothing which would affect the claim of the appellants, who complain of damage to the dock gates, etc.

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By the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the limitation of liability set by s. 503 of the 1894 Act was extended and applied to all cases where, without the actual fault or privity of the shipowners, "any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship." The Act also declared that s. 504 of the Act of 1894 should be applied to s. 2 of this Act (which relates to the limitation of liability of a dock or harbour authority) as if the words " owner of a British or foreign ship " included a harbour authority, and a conservancy authority, and the owner of a canal or of a dock. Sect. 3 of the 1900 Act declared that the limitation of liability under this Act " shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." Sect. 5 enacts that the 1900 Act shall be construed as one with the Merchant Shipping Act, 1894, and other named Acts amending the 1894 Act. It will be necessary to consider the extent to which this Act of 1900 has amended the appellants' Consolidation Act.

In the first place, there can be no doubt that the appellants are entitled under their Consolidation Act to detain the ship until the damage is paid or a deposit made. This detention could be put an end to by appropriate procedure on the part of the shipowners. The appellants would, perhaps, also take proceedings to recover the sum due, but the section imposes no such liability on them, and, indeed, does not state how, in the case of a dispute leading to a deposit, the issue is to be determined. The value of the ship is immaterial. The damage might be smaller or larger than the value of the vessel. The exercise of this statutory power to detain confers a possessory lien and is not part of any procedure to ascertain the sum due. This lien, in my opinion, could be relied upon

as justifying detention until actual payment. The Act itself prescribes the method whereby the shipowner may obtain release of the vessel—namely, by paying the sum demanded or by paying as a deposit a sum to cover the disputed amount. This right remained unaffected until 1900, for the 1894 Act and the earlier statutes made no provision for the limitation of liability in the case of damage such as that sustained by the appellants. In any case arising since 1900 the lien cannot be exercised for the purpose of enabling the appellants to claim a greater sum than the maximum allowed by s. 1 of the 1900 Act, where the shipowner takes advantage of that section; but the really important point is whether the Act has affected the exercise of the lien, and, if so, to what extent. The 1900 Act contains no words which expressly affect the right to detain her, nor in my judgment can it be inferred that the right has been affected.

It was argued that the implication necessarily follows from s. 504 of the 1894 Act. It did not, of course, have that effect when enacted in 1894, for as I have said, at that date there was no provision for limiting liability in such a claim as the appellants'. Sect. 504, moreover, is a re-enactment of a section in the 1854 Act, which is earlier in date than the appellants' 1858 Act creating the right to seize and detain. It is therefore necessary to hold that s. 504 was enlarged in its scope by reason of s. 1 of the 1900 Act and then that the section so extended has affected the right. The lien is a right created by express words, and cannot be taken away by a mere implication. To destroy it the implication must be clearly necessary. Now, s. 504 was passed to deal with a situation which had been contemplated by the earlier Acts. The limitation of liability conferred by s. 503, though a complete defence where one claimant alone appears, is not easily applied where a number of separate actions are brought by different claimants. Without further provision, great and unnecessary confusion and expense would be caused. The shipowner is therefore enabled, but not bound, to bring an action in order to have the amount of his liability determined, and in such action the Court may

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order the sum so ascertained and paid by the shipowner to be distributed among the persons who have proved their title in due time. In the ordinary course the parties all stand on the same footing, and distribution is effected by their sharing pari passu. I do not accept the view that in a limitation action the Court is bound to make an order for the distribution of the fund. I accept the view of the Master of the Rolls that the word "may" is to be read "may, if the circumstances permit" and not "may, whatever the circumstances may be." The Court must in my judgment have regard to the rights of the parties. If these rights are equal then a rateable distribution will involve payment pari passu, but the word "rateably" does not necessarily involve a distribution according to the amounts which would be due to the respective claimants if there were no limitation decree. The word can be construed, and ought to be construed, with regard to the priorities as well as to the amounts of the claims which have to be taken into account. The distributor must consider the respective rights qualitatively as well as quantitatively. The appellants, therefore, held the vessel by virtue of the exercise of their statutory powers. The Act of 1900 has cut down the amount for which the appellants can exercise this lien but has not otherwise affected it. The vessel has indeed been released by reason of the payment into Court under the order, but the sum in Court represents the vessel for this purpose. What we are asked to hold is that the lien is only effective up to the share in the fund to which the appellants would be entitled if they had no special right; in other words, that the lien is merely now an adjunct to the right to participate in any fund distributable in a limitation action. That conclusion is one which seems to me to be impossible. Assume for the moment that the appellants retained the vessel and declined to prove their claim in the limitation action, would the respondents be entitled to claim delivery up of the vessel without any payment as prescribed by the 1858 Act? Clearly not, for the appellants are entitled by the statute to retain until payment. The amount claimable by them may now

of course be subjected to a maximum as a result of the 1900 Act, but, as I have pointed out, the lien is otherwise unaffected. The shipowners are undoubtedly entitled to a decree limiting their liability to that maximum, but the Court is not bound to make an order for distribution otherwise than in accordance with the rights of the parties. If, therefore, the rights of one party are such as to exhaust the fund, no order should be made which would have a different effect, and if so made it would be wrong. The Court may not in the exercise of its jurisdiction destroy rights in order to give effect to some idea of equality of treatment.

I have reached this conclusion independently of authority, and indeed there are no decisions upon the matter which are binding upon your Lordships' House. Nevertheless, what authority there is confirms the views that I have formed.

Leycester v. *Logan* (1) was a case where the defendant had obtained judgment in the Court of Admiralty before the limitation proceedings. The vessel had been arrested by Admiralty process and was held liable to be sold. It was held that the sections of the 1854 Act gave the Court power to stay the actions notwithstanding that Logan had obtained judgment, but he was permitted to sell the ship and retain his costs out of the proceeds. As to the amount awarded as damages it was held that the judgment did not entitle Logan to more than his rateable share. The decision therefore merely amounts to this: that diligence in obtaining a judgment in other proceedings does not confer priority over other claimants.

In *Rankine* v. *Raschen* (2) shipowners paid out to the owners of an injured vessel the amount of their claims and subsequently obtained a decree limiting their liability to 8*l.* per ton. It was held that, on the redistribution of the fund in the limitation action, regard must be had to the sum paid out in the former action. This is obviously a case where parties were on the same footing and consequently no priority should be given to one of them. It affords no guidance in the present case.

(1) 3 K. & J. 446. (2) 4 R. 725.

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The Victoria (1) was a case where the amount paid in respect of loss of life and personal injury (7*l.* per ton under s. 54 of the 1862 Act) proved to be insufficient, and the question was whether the balance remaining unpaid was to rank with the claims for loss of goods in the distribution of the sum calculated at 8*l.* per ton (which was the limit in respect of loss of goods). Butt J. upheld the registrar's report that such balance was to rank and said, "The Act interferes with the claimants' right only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to show that persons who have suffered loss have their rights otherwise altered."

Jenkins v. *Great Central Ry. Co.* (1912), which appears only to have been quoted in the Shipping Gazette, and is cited in vol. xxvi. of Lord Halsbury's Laws of England at p. 614, is merely an example of the rule that a claimant who by diligence obtains judgment does not thereby gain priority over fellow claimants. It is for this reason probably that the decision has not been reported.

The Emilie Millon (2) turned upon ss. 248 and 253 of the Mersey Docks Consolidation Act, 1858, which give the appellants a power to detain any vessel until the docks, tonnage and harbour rates have been paid. This power resembles the power conferred by s. 94 of the same Act now in question. When the vessel entered the dock, the master and crew had a maritime lien for wages due. While the vessel lay in the harbour the master and crew brought an action in rem in the Court of Passage to enforce their lien and recovered judgment. The ship was arrested, and after an abortive attempt to sell by auction she was sold privately. The Court then made an order that the ship be delivered to the purchaser free from all claims and demands upon payment into Court of the purchase money less the auctioneer's charges. The order preserved the rights of the appellants as against the fund in Court. The appellants appealed on the ground that the statute enabled them to detain the vessel until the

(1) 13 P. D. 125, 127.

(2) [1905] 2 K. B. 817.

rates, etc., were paid, and that no other person, either purchaser or holder of a maritime lien, has any greater right than the owners. It was held that the contention was well founded. Collins M.R. said (1): "The only protection which s. 253 gives them is the right to detain the vessel until the dock dues are paid, and nobody can, against the will of the Board, undo or annul that statutory provision." So far as this case is material, it is an authority entirely in favour of the appellants.

The earlier decisions, therefore (to which for this purpose I am unable to assign much importance), either do not touch the point before your Lordships or confirm the opinion which I have formed independently of authority.

For these reasons I am of opinion that the appellants are entitled to succeed, and that the sum in Court, standing, as it does, in the place of the ship, is subject to the Board's lien under s. 94 of their Act. The sum therefore should be paid out to the appellants.

I move, therefore, that the appeals should be allowed with costs both here and in the Court of Appeal.

VISCOUNT FINLAY. My Lords, this case raises an important question as to the construction of the 504th section of the Merchant Shipping Act, 1894.

The facts are few and simple. The *Countess*, steamship, was, on June 5, 1920, being navigated in the Alfred Dock at Birkenhead. By the negligence of those on board, she came into collision with the dock gates leading from the dock to the River Mersey and burst them open, doing great damage, estimated at over 10,000*l*. The water in the dock was at the time above the level of the water in the river. The result was that there was a great rush of water outwards. A number of barges in the dock were swept out into the river and seriously damaged.

The Dock Board detained the *Countess* under their statutory powers in respect of the damage which had been done to the dock. On June 14, 1920, the owners instituted a suit in

(1) [1905] 2 K. B. 821.

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the Admiralty Division for a limitation of their liability in respect of the damage done by the accident, and on July 12 brought a second action in detinue, alleging that the detention of the vessel was wrongful. The amount of the statutory liability of the *Countess* was 4468*l.*, and in the limitation action a decree was made staying procedure in respect of the various claims for damage on this amount being brought into Court. In the action of detinue it was held that the detention was justified by the statutory powers of the Board.

The full claim of the Board for damage to the dock was for 10,000*l.*, but it was agreed that the statutory limitation of liability to 8*l.* per ton made it impossible for the Dock Board to recover more than 4468*l.* The Dock Board claimed that their seizure of the *Countess* under their statutory powers had conferred upon them a possessory lien on the vessel, and on the fund in Court representing the vessel, which entitled them to payment in full, leaving nothing for the other claims, which were chiefly by the owners of the barges which had been damaged. On the other hand, it was contended for the bargeowners that the effect of the decree in the limitation action was to put the Dock Board on the same footing as all the other claimants, and that they must share rateably according to the amount of their claims.

The claim of the Dock Board is based on the fact that they had a possessory lien on the *Countess* in respect of the damage done by her to the dock property. Sect. 94 of the Mersey Dock Acts Consolidation Act, 1858, enacts that in every case in which damage is done by any vessel to any works belonging to the Board the amount may be recovered in a summary way, "or at the option of the Board such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the Board for the estimated amount of damage so done by such vessel," and the Board are further authorized to retain the deposit until the whole amount of damage shall have been ascertained and paid, and provision is made for the application of the deposit in satisfaction of the claim. It may be

mentioned that there are similar provisions in the Harbour Docks and Piers Clauses Act, 1847, s. 74.

The enactments in force in 1858 as to limitation of liability of a shipowner for damage done by his ship without his fault or privity were contained in ss. 504, 506, and 514 of the Merchant Shipping Act, 1854. The limit of liability was to be the value of the ship and freight, with a provision for a minimum value per ton in case of liability for loss of life or personal injury. In case of several claims power was given to the Court of Chancery to entertain proceedings by the shipowner for the determination of the amount of liability and its distribution among the several claimants. The limit of liability was altered by the Merchant Shipping Amendment Act, 1862, s. 54. But these earlier enactments were superseded in 1894 by the Merchant Shipping Act of that year, ss. 503 and 504. It is upon the construction of this Act that the decision in the present case must turn.

The 503rd section limits the liability to 8*l.* per ton in respect of damage caused to other vessels. The 504th section provides that in the case of several claims the owner of the ship which has caused the damage may apply to the High Court, "and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants," and gives power to stay proceedings in other Courts.

It is obvious that this last section is one providing the machinery for working out the rights of the parties where there are more claimants than one. The question raised in the present case, however, is whether the provisions for a rateable distribution have the effect of putting all claimants on the same basis according to the amounts of their claims.

These enactments, while they applied to the case of collision between ships, did not apply to collision between a ship and any works or buildings on shore, but in 1900 their scope was enlarged so as to include such cases. This was effected by the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, ss. 1, 2, 3 and 5. Sect. 1 provides that the limitation of the liability of the owners of any ship shall apply

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to all cases where without their own actual fault or privity any loss or damage is caused to property of any kind, whether on land or water, by the improper navigation or management of the ship. Sect. 2, sub-s. 3, provides that s. 504 of the Merchant Shipping Act, 1894, shall apply to that section as if the words "owner of a British or foreign ship" included harbour and conservancy authorities and the owner of a canal or dock. Sect. 3 provides that the limitation of liability shall relate to the whole of any loss or damage which may arise upon any one distinct occasion, although such loss or damage may be sustained by more than one person and applies whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act.

The contest in the present case is substantially one between the Mersey Board claiming in respect of the damage to their works on the one hand and the owners of the barges claiming for the damage done to their barges on the other. The bargeowners contend that the effect of the provisions of s. 504 of the Merchant Shipping Act of 1894 as to rateable distribution is to destroy any claim by the Board to priority based on their possessory lien.

The first contention put forward by the Board is that this s. 504 is not by the Act of 1900 made applicable to collisions between ships and the works of a dock. The argument is that s. 1 of the 1900 Act incorporates only s. 503. In my opinion this contention fails. The words of the 1900 Act are that "the limitation of the liability of the owners of any ship set by section 503 of the Merchant Shipping Act 1894" in respect of damage to vessels shall apply to damage to property on shore caused by improper navigation of the ship. It would, in my opinion, be too narrow a reading of this enactment to hold that the incorporation does not include s. 504. That section is, in my view, a provision for working out in practice the rights given by s. 503, and when the Act of 1900 applies the limitations set by s. 503 it must include the machinery without which the enactment would be unworkable. At the same time, it must be

observed that other considerations might arise if s. 504 were to be read as dealing not merely with machinery but as altering the substantive rights of the parties by nullifying a possessory lien which one of them had by statute. On the view which I take of the effect of s. 504 I think it is incorporated by the language of the 1900 Act.

I do not read the provision of s. 504 that the Court may distribute the amount of the owner's liability rateably among the several claimants as meaning that the Court is to have regard in the distribution solely to the amounts of the claims. If the fund in Court represents a ship in which a claimant has a possessory lien, and if the fund in Court would otherwise be subject to a prior claim in virtue of that possessory lien it is to me quite inconceivable that the person having that lien should be deprived of it by such a provision as the present.

The word "rateably" is not strong enough to support the burthen which the argument for the bargeowners would throw upon it. I do not think that this word necessarily excludes the consideration of charges in favour of one claimant upon the fund in Court, and, further, I do not think that an enactment that the Court *may* distribute rateably should be read as applicable to a case in which such a distribution would be inconsistent with the rights of the parties. It would require the clearest terms to justify us in construing this section as authorizing, nay, as requiring, the confiscation of the right of one claimant for the benefit of the others. I agree entirely with the view which the Master of the Rolls takes of the effect of this enactment. Atkin and Younger L.JJ., who differed from the Master of the Rolls, both laid great stress upon the provision in the 3rd section in the Act of 1900, that "the limitation of liability under this Act . . . . shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." All that is meant by this provision is that the total liability of the owner is limited to the aggregate amount yielded by the number of tons in the ship at the prescribed amount per ton. The question here

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is another and a very different one—namely, how this amount is to be divided among the claimants, and this question is not touched by s. 3 of the 1900 Act, but depends solely upon the construction of s. 504 of the 1894 Act.

No possible reason can be suggested for the proposed confiscation of the right conferred by a possessory lien which attaches to a fund in Court. I do not think that the words bear the construction put upon them by the defendants, but even if there were any ambiguity about the language, an enactment dealing with machinery should not be construed so as to alter the rights of the parties.

The whole question is very fully discussed in the judgment of the Master of the Rolls, and I shall not repeat the various considerations to which he calls attention so pointedly.

A few words must now be said with reference to the proceedings.

The accident happened on June 5, 1920, and notice was sent by the Board to the owners of the *Countess* that she was detained in respect of the damage done. On June 12 the owners stated that they did not admit the right to detain. On June 14 the owners issued a writ for limitation of liability in respect of the collision, and on July 5 the statement of claim in that action was delivered, claiming a declaration of liability limited to 8*l.* per ton and claiming to pay 4468*l.* into Court and to have proceedings stayed. On the same day the owners took out a summons in the limitation action for the release of the vessel on payment into Court of 4468*l.* This summons on July 12 was dismissed.

On this same July 12 the owners of the *Countess* commenced an action of detinue, in respect of the detention by the Board of the *Countess*, and a summons was taken out in this action for an order for the delivery up of the ship upon such terms as to payment into Court as might appear to be just. This summons was dismissed, but on appeal the following order was made on July 26 :—"It is ordered that on the Plaintiffs paying into Court to the credit of this action the sum of 5,500*l.*, the vessel be released by the Defendants and if it is decided that the Defendants' claim of lien is

justified, the Defendants' rights over the sum in Court to be the same as they would have had if the sum in question had been paid to them as deposit under section 94 of the Mersey Docks Acts Consolidation Act, 1858, and section 7 of the Mersey Docks and Harbour Board Act, 1912."

It follows from this last order that the rights of the Mersey Board over the sum in Court are, if their claim of lien is justified, to be the same as they would have had if the sum had been deposited under s. 94 of the Act of 1858. I have already referred to the provisions of that section, and it appears from them that the money in Court would have been available as security or for the satisfaction of the liability for damages.

The two cases, the action for limitation and the action of detinue, were heard together, and on March 23, 1921, judgment was given for the limitation of liability to 4468*l.*, and the President further ordered that on the transfer to the credit of the action for the limitation of liability from the credit of the action in detinue of the sum of 4451*l.* and on payment of a further sum making the amount up to 4468*l.*, all further proceedings in the other actions should be stayed. On the same day, March 23, in the action of detinue, the President gave judgment for the defendants in favour of their right to detain the *Countess* until the damage was paid for or a deposit made, and further ordered that the money in Court be transferred to the credit of the limitation action.

It follows that, on the view which I take of the construction of the statute, the Mersey Board are entitled to have the money paid out to them in respect of their claim for damage. There is nothing to deprive them of the possessory lien they had on the ship, now transformed into a right in respect of the money in Court under the orders to which I have called attention.

In my opinion these appeals should be allowed.

LORD ATKINSON. My Lords, the facts of this case have been fully stated. Putting aside for the moment some conflicting and rather inconsistent orders which have been

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made in the case, the substantial question for decision on this appeal emerges clearly enough. It is admitted that, by the negligence and default of those in charge of the ship *Countess* on behalf of her owners, the respondents, she collided with the gates of one of the docks of the Mersey Docks and Harbour Board, hereinafter, for shortness, called the Board, causing damage to the property of the Board to the amount of over 10,000*l*. By the damage to the dock gates certain barges which had, at the time of the collision, been floating in the dock, were seriously injured, and their owners claimed damages from the owners of the *Countess* in respect of these injuries. It was not alleged or proved that the injury done by the *Countess* to the dock gates and barges was inflicted with the actual fault or privity of her owners. By s. 94 of the Mersey Docks Consolidation Act of 1858, it is provided that where any damage shall be done to any of the things therein named or any other work belonging to the Board, through the negligent misconduct or default of the master of any vessel or of any other person on board of her, the amount of the damage may be recovered from the master or owner of the vessel in a summary way before any justice in the same way as any penalty is thereby made recoverable. (The amount of the damage means, of course, the full amount of it, not a fraction of it.) At the option of the Board, the vessel may be detained until either of two things shall happen: (1.) the damage shall have been paid; or (2.) a deposit shall have been made by the master or owner of the vessel, equal in amount to the estimated amount of the damage done by the said vessel, which deposit the Board are authorized to receive and retain until the entire amount of the damages shall have been ascertained by the Board and paid to them by the master or owner of the ship. Provision is made that in certain events the deposit or so much thereof as may be necessary may be applied by the Board for the making good the damage done.

It is not disputed that under this clause the Board, as the summary remedy was not resorted to, would acquire, at its option in cases to which the section applied, a possessory

lien upon the vessel in default until the entire amount of the estimated damage was paid. Since it is, in my view, too clear for argument that, if the deposit authorized by this Act was in fact made, it was substituted for the ship, and the Board got the right to detain it just as they had the right to detain what it represented, the ship, one would naturally suppose that if it was designed by the Legislature to deprive a public body like this Board of a power so indispensable as this for the discharge of their widely extended and onerous duties they would have done so by a clear and explicit enactment. It is not pretended that they have done so. But it has been decided that the lien thus expressly given, though not destroyed, is rendered worthless by the reflex action, as it might be styled, of a statute merely intended to protect from heavy loss owners of ships which caused damage through their negligent and improper navigation or management. This statute is the Merchant Shipping Act of 1894, and its sections which are important on this point are the 503rd and 504th. These sections are, to a great extent, merely re-enactments of earlier legislation—namely, the 504th, 506th and 514th sections of the Merchant Shipping Act of 1854, and the 54th section of the Merchant Shipping Amendment Act of 1862. By the first of those sections of the Act of 1894, sub-s. (*d*) (i) and (ii), it is provided that the owners of British or foreign ships shall not be liable, where, without their actual fault or privity, injury is done by their ship, to damages in respect of loss of life or personal injury either alone or together with loss or damage to vessels, goods or merchandise to an aggregate amount exceeding 15*l*. per ton of the ship's tonnage; and in respect of loss or damage to vessels, goods, merchandise and other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l*. per ton of the ship's tonnage. By the first section of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the limitation of liability in this section, 503, is made applicable to all cases where without actual fault or privity of the owners loss or damage is caused

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to property of any kind through the improper or negligent navigation of a ship. The dock gate of the appellants came within this section, even if not within the 94th section of the Act of 1858.

Sect. 504, upon the proper construction of which the question for decision on this case mainly turns, has been already stated.

On July 14, 1920, proceedings were instituted by the respondents to limit their liability under this section, which, measured by the tonnage of the *Countess*, amounted to the sum of 4468*l.* 4*s.* 9½*d.*, the damage to the appellant's property being stated to be 10,014*l.* Much litigation followed. Meanwhile an action of detinue was instituted by the present respondents against the Board. Both actions came on together, and ultimately the order dated July 12, 1920, which has already been mentioned, was made.

On July 27, 1920, the respondents paid into Court 5500*l.*, and the steamship *The Countess* was delivered up to them.

It is not disputed that the day before the amount of the owners' liability was determined under this 504th section, they could only have obtained possession of their ship from the Board by paying, under the 94th section of the Act of 1858, the amount of the damage done to the Board's property, presumably about 10,000*l.*, or depositing that sum with the Board; but, according to the decision of the Court of Appeal, the owners became entitled by virtue of the decision limiting their liability to obtain possession of their ship, not by paying to or depositing with the Board the sum to which their liability is limited—namely, 4468*l.* 4*s.* 9*d.*, but upon the receipt by the Board, as one of the several claimants for damages, of such a dividend upon the amount of its claim, as this limited sum would enable the Court to pay on its distribution pari passu amongst all the claimants. Such is said to be the force and potency of the words "and may distribute that amount rateably among the several claimants," used in the section.

The possessory lien of the Board is not destroyed. On the contrary, Atkin L.J. states at p. 141 of the Appendix

that it continues to exist, that the Board is entitled to exercise it till it has been paid this dividend. Younger L.J. says, at p. 150 of the Appendix, that he cannot conceive the retention of it for a larger amount. But this in the result renders the Board's lien practically worthless. It secures to the Board nothing which it would not receive if it had no lien, namely, a dividend on the amount of its claim, just as the other claimants who have no liens would get a dividend on the amounts of their respective claims. It is the Court that is to distribute the amount of the owners' limited liability. Lien or no lien, the Board will get its dividend from the Court. The lien in no way makes the receipt of the dividend more secure to the Board.

Younger L.J. relies much on the provision of s. 3 of the above-mentioned Act of 1900. It runs as follows: "3. The limitation of liability under this Act shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act."

Sect. 1 of the Act of 1900 purports only to limit the amount which a dock authority can recover under s. 503 of the Merchant Shipping Act of 1894, but whether it extends to s. 504 of that statute or not it does not refer in any way to the lien given by s. 94 of the Mersey Dock Consolidation Act of 1858 for damages. For the reasons given by Lord Sterndale in his judgment, I think it may have been a quite business-like arrangement to have provided by s. 504 and s. 514 of the Act of 1854 that the owners should be empowered to pay 8*l.* per ton of the tonnage into Court to be distributed pari passu amongst claimants of the same class, standing on the same footing. But the question for decision in this case is, can this be done so as to destroy the value of a security, a possessory lien conferred by statute? The provisions of s. 504 are not compulsory. The shipowner need not apply under it; the Court is not compelled to act under it. The

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words are "may determine," and "may distribute." As I shall presently endeavour to show, those words are not to be treated as obligatory where so to treat them would work injustice. These words, as Lord Sterndale states, seem to carry with them the meaning "may if circumstances permit," and not "may whatever the circumstances may be," or whatever the rights of the parties may otherwise be. Neither by s. 1 of the Act of 1900 nor by ss. 503 or 504 of the Act of 1894 is the Board expressly deprived of its valuable security, but, if the decision appealed from be right, the shipowner may, at his option, procure that this security shall be rendered valueless, and all this although the amount covered by the lien in respect of the damage done to its property is admittedly far in excess of the statutory limit of 8*l.* per ton of the ship's tonnage. No inquiry was necessary on that point. Again, it does not appear to me to be just or reasonable to construe the word "rateably" occurring in this s. 504 in such a way as to level secured and unsecured claimants, and to distribute the amount of the owners' liability amongst them proportionately to the amounts of their respective debts. That is, as I have pointed out, in effect to destroy or render worthless the Board's security. No express and positive provision of any of the statutes referred to requires that this must be done. Younger L.J. seems to rest his decision somewhat on the principle that equality is equity. That may be so, but with the most unfeigned respect for the learned Lord Justice, that does not mean that secured and unsecured creditors are to be treated alike. For instance, equality of distribution of a bankrupt's assets amongst his creditors is the fundamental all-pervading principle of the Bankruptcy Code. But the fact that some of those creditors hold securities for their debts is not ignored; on the contrary, a secured creditor must either realize his security, or surrender and prove against the bankrupt's estate for the entire amount of his debt, or value it and prove for the balance of his debt. A secured creditor is by s. 168 of the Bankruptcy Act of 1883 defined to be a person holding a mortgage, charge or lien on the property of the debtor as a security for the debt due

to him by the debtor. If the respondents became bankrupt the Board would, I think, independently of s. 504, be treated as secured creditors, and their claim would not be levelled or treated on the same basis as the debts of claimants who had no security. If s. 504 expressly enacted that the claim of the Board should be so levelled, of course there would be an end to the question. But if the words of that section are reasonably susceptible of a construction which will not work that injustice they should receive that construction. I concur with the Master of the Rolls in thinking that the words of the section are susceptible of a construction which leaves the security of the Board unimpaired, save to this extent that the Board must deliver up the ship on getting, instead of the amount of the damage done to them, the amount to which the liability of the owner has been limited. That sum is the substitute for the ship as was the deposit under the 94th section of the Act of 1858, and the Board are entitled to hold it. The dividend they would obtain on a rateable distribution of this sum amongst all claimants is not a substitute for the ship and does not represent it.

I turn to the authorities cited in argument. In support of the permissive character of the provisions of the 504th section, I refer to *Julius* v. *Bishop of Oxford* (1), which has long been regarded as the leading authority on the question as to the meaning to be given to the word "may" or to the words "it shall be lawful," when occurring in statute. Lord Cairns, in giving judgment in that case, said "the words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power." He then proceeds to show that this power to do a certain thing may be so coupled with a duty, that the person empowered to do the particular thing is under an obligation to do it, and then proceeds "And the words 'it shall be lawful' being in their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an

(1) 5 App. Cas. 214, 222, 235.

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obligation exists to exercise this power, to show in the circumstances of the case, something which, according to the principles I have mentioned, creates this obligation." He refers to the case of *Rex* v. *Barlow* (1) amongst others as a good example of the application of this principle. Lord Selborne said, "I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

Lord Blackburn deals at length with the authorities, and shows that the words "it shall be lawful" are equivalent to the word "may" and that there the same principles of construction apply to statutes in which they are respectively used. I fail to see what duty lies upon the Court before which the application mentioned in s. 504 comes to distribute the amount of the owner's limited liability in such a way as to render worthless the Board's lien. A contention was put forward, however, on the hearing of the appeal on behalf of the bargeowners, and apparently accepted by the Court of Appeal, that the construction of s. 504 which I, following the Master of the Rolls, have suggested cannot be reconciled with the principles laid down in the authorities, and especially by the Court of Appeal on *The Emilie Millon*. (2) I cannot accept that view, and an examination of the details of that case will show, I think, that the view is unsound. That decision is, of course, not binding on this House.

By the 248th and 253rd sections of the Mersey Docks Consolidation Act, 1858, an absolute power is given to the Mersey Docks and Harbour Board to detain any vessel until the dock tonnage and harbour rates due by her have been

(1) (1694) 2 Salk. 609. (2) [1905] 2 K. B. 817.

paid. This closely resembles the power of detention given by the 94th section of this same statute in respect of damage caused to the property of the Board. In the *Emilie Millon* case the master and crew of the vessel had a maritime lien for wages due to them before she entered the dock. While she lay there the master and crew brought an action in rem in the Court of Passage at Liverpool in its Admiralty jurisdiction to enforce this maritime lien. They recovered judgment. The ship was arrested under the warrant of the Court, and an order was made for her sale by auction by the Marshal of the Court. The attempt to sell the ship by auction having failed she was sold by private treaty for 250*l*.

Ultimately an order was made by the Court that the sale of the ship be confirmed and that the vessel should be delivered to the purchaser free from all claims and demands against her on payment of the purchase money into Court less the auctioneer's charges: that the Marshal's account be taxed and paid out of this money: that any right of the Mersey Docks and Harbour Board to payment of their charges in priority to other claimants under the Act of Parliament should be preserved against the fund in Court. The Board appealed against this order.

It was contended on behalf of the Board that the 253rd section of the Act of 1858 gave to it an absolute right as against all the world to detain the vessel until the rates were paid; that the Act did not give to the Board any charge upon or right against the purchase money of the vessel if sold; it simply gave it a right to detain the vessel until the rates were paid. That the Board have nothing to say to any question between vendor and purchaser, that they had no concern with the rights of third parties, whether by maritime lien or otherwise as against the vessel or the owners. That these persons could not stand in a better position with regard to the Dock Board than the owners. For the respondents and the master and crew it was contended that the vessel went into dock with the maritime lien attaching. That the master and crew, having this lien, were in a better position than the owners, and that the right of the Dock Board to detain the

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ship was subject to the maritime lien which had already attached. The Court decided against this contention. They held that this 253rd section gave to the Board a paramount right to detain a vessel till the dock tonnage rates were paid, notwithstanding that the master and crew of the vessel had a maritime lien for wages due to them. Collins M.R., in delivering judgment, said (1): "The order made by the learned Judge of the Court of Passage seems to ignore that right" (i.e. the right to detain the vessel) "so clearly given by the Act because it orders the vessel to be delivered to the purchaser free from all claims and demands against her, and it purports to preserve to the board as against the fund in court any right which their Acts may give them to payment of their charges in priority to other claimants. The board have no such prior right or charge. The only protection which s. 253 gives them is the right to detain the vessel until the dock dues are paid, and nobody can, against the will of the board, undo or annul that statutory provision." Romer L.J. delivered judgment to the same effect. My Lords, so far from this being a strong authority in favour of the respondents or the bargeowners, it seems to me to be a strong authority in favour of the appellants. It shows that the statutory right of the Board to detain the ship till the dock dues are paid, similar to that of the Board in the present case, is paramount to all maritime liens. By parity of reason the statutory right of the Board to detain a vessel till the amount of the damage done by her is paid or deposited, would take precedence of all other liens or charges upon the vessel; and to use the words of the then Master of the Rolls, nobody can annul or undo that statutory provision without the consent of the Board. To level the claim of the Board with the claims of all the other claimants is practically to annul and undo it, without the consent of the Board. What the Board is claiming is not a charge upon the ship or her value; it is the right to detain the ship herself till the damage done to the property of the Board is paid for. If the 4468*l.*

(1) [1905] 2 K. B. 821.

represents, and is the substitute for the ship, as I think it is, the Board is entitled, in my view, to hold it.

In *Rankine* v. *Raschen* (1) the owners of a ship in default paid out of Court to the owner of an injured ship the amount of the latter's claim. Subsequently the owner of the former ship by suit limited his liability to 8*l.* per ton. In the distribution under the 54th section of the Merchant Shipping Act of 1862 and the 514th section of the Merchant Shipping Act of 1854 of the fund thus created, it was decided that the sum paid out of Court should be taken into consideration. To do otherwise would be to give to a person who claimed to be entitled to a right of a certain kind and character, priority over the person entitled to the same right. Though relied upon in argument on behalf of the bargeowners, the case does not touch the present case.

The Victoria (2) was the next of the cases relied upon. The decision turned upon the 54th section of the Merchant Shipping Act of 1862 (25 & 26 Vict. c. 63), by which it was enacted that where, by the improper navigation of a ship, persons on another ship are killed or injured, or any goods, etc., on such other ships are lost or damaged, the owner of the ship in default shall not be liable in damages for the loss of life or personal injury, either alone or together with loss or damage to goods to an aggregate amount exceeding 15*l.* per ton of the ship in default, nor in respect of the loss, etc., or damage to ship's goods, merchandise, etc., whether there be loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* per ton.

In a suit by the owner of the *Victoria*, the ship in default, to limit the liability he paid into Court a sum 7862*l.* 18*s.* 10*d.*, being 15*l.* per ton of her tonnage, of which sum 8*l.* per ton was the limit in respect of loss of goods. 7*l.* per ton was held by the registrar to be insufficient to satisfy the claims in respect of loss of life and personal injury, and it was also held by him that the balance of these claims were entitled to rank pari passu with the claims for the loss of goods against the further sum equal to 8*l.* per ton, whereas the owner of the

(1) 4 R. 725. (2) 13 P. D. 125, 127.

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goods claimed that these latter claims should have priority. The learned judge Butt J. held that the report of the registrar was just and equitable, and in delivering judgment used this significant language : " The Act interferes with the claimants' right only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to shew that persons who have suffered loss have their rights otherwise altered."

In *Leycester* v. *Logan* (1) the point decided was, according to the passage dealing with it on the page of Halsbury's Laws of England, to which Younger L.J. refers, namely, vol. xxvi., p. 614, this : " The court sees that a shipowner is not made liable to pay any sum in excess of these amounts out of any moneys over which the court has control."

The facts of the case are as follows : A ship named the *Falcon* collided with and sank a ship named the *Imogene*. Her cargo and some passengers' luggage which was on board her were lost. The plaintiffs, the owners of the *Falcon*, admitted that they were in respect of these losses responsible in damages to the extent of the value of their ship and the freight due, or to become due, in respect of her then voyage, and admitted, further, that the value of the ship and freight was insufficient to answer all the claims that were in fact made, or might be made, in respect of the *Imogene*. Several actions were commenced against the plaintiffs in the Admiralty Court of London by the owners of the *Imogene*, by the owners of part of her cargo, and by certain passengers. In one of these actions commenced by one Logan, judgment was obtained condemning the plaintiffs in damages for the losses sustained by the collision, with costs. The ship *Falcon* was arrested by the process of the Admiralty Court, and was held liable to be sold, and continued so to be held up to the hearing of the case. The plaintiffs filed a bill in the Court of Chancery, apparently to have their liability limited under s. 504 of the Merchant Shipping Act of 1854, and under s. 514 for an injunction to restrain Logan from proceeding to have the ship sold under the judgment he had

(1) 3 K. & J. 446.

already obtained, and the other defendants restrained from prosecuting their actions. It was held that the provisions of those two sections applied, and gave the Court of Chancery jurisdiction to stop the actions, notwithstanding the circumstance that one of the adverse claimants Logan had obtained a judgment condemning the ship, and that the utmost to which Logan was entitled under this judgment was to share rateably with the other claimants in the value of the ship and freight. Logan, however, was permitted to proceed to sell the ship, and out of the proceeds to retain such costs as the Court of Admiralty might by its order entitle him to. The decision in this case merely amounts to this, that a claimant gains nothing over his fellow claimants by his diligence in obtaining judgment in the Admiralty Court in respect of his own claim.

In the case of *Jenkins* v. *Great Central Ry. Co.* (Shipping Gazette, January 13, 1912, Halsbury's "Laws of England," vol. xxvi., p. 614) a cargo owner had succeeded in respect of loss of cargo consequent on collision against the owner of the ship in default in the Court of first instance, the amount of the judgment was paid into Court as a condition of a stay of proceedings pending appeal. Notice of appeal was given, but subsequently the shipowner, having after judgment obtained a limitation decree, paid into Court the limited amount, asked leave to withdraw his appeal and to have the money paid into Court returned to him. This he obtained. This is only another example of the rule that under s. 504 a claimant gains no advantage over his fellow claimants by diligence in obtaining judgment for the amount of his claim. I do not think that any of these cases establish that the construction of s. 504 which I have suggested is unsound.

I think it never could have been intended that by the provision of the 504th section the rights of the Board should have been practically swept away or that this section on its proper construction levelled all debts, whether secured or unsecured, and provided that all claims for damages, irrespective of their nature, character or class, whether secured by a lien or otherwise, should be treated as on the same level as

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unsecured claims. In my opinion this sum of 4468*l.* odd stands quoad the Board's lien in the place of the ship, and the Board are entitled to hold it. I think, therefore, the appeal succeeds, that in the detinue action the sum of 4468*l.* 4*s.* 9*d.* should be paid out of Court to the appellants, and that the respondents should pay to the appellants their costs here and in the Court of Appeal.

LORD SUMNER. My Lords, s. 1 of the Merchant Shipping (Liability of Shipowners) Act, 1900, does not in terms apply s. 504 of the Merchant Shipping Act, 1894, though s. 2 does. Nevertheless it seems to me to be plain that s. 1, truly construed, does apply s. 504 as well as s. 503 of the Act of 1894 to the case of damage to dock property by negligent navigation of a ship. Sect. 1 confines the shipowners' liability to an "aggregate" amount and enacts it by the phrase "the limitation of the liability of the owners of any ship set by section 503 . . . . shall extend and apply." This is not a simple amendment of s. 503 by inserting a sub-head thus: "(*e*) Where any loss or damage is caused to property, whether on land or on water, or whether fixed or moveable." It is, in my opinion, the extension to damage to fixed property of an existing system of judicially limiting liability in respect of life, ships and cargo so as to fix an aggregate amount, which will discharge all liability incurred by the shipowners in the aggregate to all the persons who may be entitled to hold them liable. Limitation is the process by which a limit is made effective. Since limitation of liability was first enacted in favour of shipowners in 1734, it has always been accompanied by the enactment of procedure, by which a single Court has been empowered to deal with all claims on the shipowners and to satisfy them in one proceeding out of the aggregate amount of the limited liability. The language used has varied, but, as Lord Blackburn pointed out in the case of the steamship *Khedive* (1), the substance has remained and still remains the same. Indeed, without the importation of some such judicial system as was familiar to the Legislature in

(1) (1882) 7 App. Cas. 795, 815.

1900, shipowners could not be fully protected and claimants would be remitted to a competitive scramble for the aggregate sum, in which the hindmost would come off as the hindmost proverbially do. Each claimant would necessarily bring his own action; each would proceed separately to trial; and no tribunal would have power to stay any of the actions or to order that only one action should proceed. Suppose then that one Court should hold that the negligent navigation was not "without the actual fault or privity of the owner," although the occasion and the evidence was practically one, and the other Courts took the contrary view, the shipowners would then be liable to pay twice, once the limited and once again the full amount. Suppose that the shipowners pleaded the statutory limit in each action and that absence of actual fault or privity was established, but that the judgment first pronounced was for the full limited amount. That judgment being satisfied in full, subsequent judgment creditors would get nothing. Suppose, again, that all the actions were simultaneously begun and that all the judgments were pronounced on the same day. The question, who would get the money, would depend on the agility of the judgment creditors in putting the sheriff in motion. I do not see what power any Court would have, even if the actions had been consolidated, to order a rateable distribution, unless s. 504 applies. The whole conception of a limitation of liability "set" by the Act of 1894 is the conception of a discharge of the shipowners on the one hand and a distribution of the aggregate sum, to which they elect to limit their liability, on the other. This can only be done by a Court, which can bring all the parties before itself. Of that system and of that judicial procedure the Legislature in 1900 was fully aware: it found them clearly set out in the Act of 1894 and it prescribed that the Act of 1900 should be construed as one with the Act of 1894. This is, in my opinion, amply sufficient to apply s. 504 to the present case.

I do not place any reliance for this purpose on the second and subsequent sections of the Act of 1900. That Act has two objects—the first to limit the liability of shipowners to dock

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authorities in the same way in which their liability to other shipowners and to cargo owners was already limited. This object is effected by s. 1, which extends the old limitation of liability "set" by s. 503 of 1894. The second object is to limit certain liabilities of dock owners; this is a new limitation of liability under this Act—namely, the Act of 1900, and it is with this that s. 2 and the subsequent sections deal, laying down for it lines necessarily very different from those of the older limitation. Accordingly I think the fact that s. 2 of 1900 mentions s. 504 of the Act of 1894, while s. 1 does not, is of no real importance. Similarly to my mind nothing turns on s. 3 for the purposes of this case. The difference between the objects of s. 1 and those of the rest of the Act and the different methods of attaining those objects respectively are enough to explain the mention of s. 504 in one part and the silence of the other part about it, and prevent the maxim expressio unius exclusio alterius from having any application to it in this connection. The Legislature was free to employ one structure in one part and another in the other part of the Act. It does not follow, because it amended s. 504 in one case or, more truly, added expressly to its provisions, that it may not have equally added to its provisions in the other case, though it only used the words "the limitation of liability, set by section 503, ... shall extend and apply." The words "extend and apply" suffice, in my view, to give the unaltered language of s. 504 a new and extended meaning in such application, though from 1894 to 1900 it had no application to dock structures at all.

My Lords, if I may say so without disrespect, the appellants have throughout based their argument on a fundamental fallacy—namely, that it is really the ship that is liable and not the shipowners; that the Acts enable the shipowners to substitute 8*l.* a ton for their ship; that procedure is of subordinate importance and that, if the shipowners deposit 8*l.* a ton somewhere, they can go away with the ship legibus soluti. Everything else goes on as before. The Board, so far as may be necessary, has a possessory lien for its claim on the money deposited and that lien must be discharged, since it cannot

be cut down. In spite of the action for limitation of liability, the bargeowners are left in the lurch.

No case was cited in which such a claim to priority in a limitation of liability action has been sustained. All the comparable cases, though none is directly in point, are adverse to such an interference with equality, and suggest the principle that a rateable distribution places on the same footing all claims which, as in this case, are the same in their quality. If the shipowners have already paid a claimant in whole or in part, that claimant must in effect bring the money into account: *Rankine* v. *Raschen* (1); if his diligence has obtained a judgment in rem against the ship, he can only avail himself of it (apart from costs) as a security for his rateable share in the limited fund, for which alone the shipowners are liable: *Leycester* v. *Logan* (2); if some claimants have already obtained payment by proceedings in rem, still the shipowners can in their subsequent proceedings for limitation of their liability receive out of the 8*l.* a ton, which they are liable to bring into Court, a return of the sum so obtained, leaving these claimants to receive out of it only their rateable share, after giving credit for the sum: *The Crathie.* (3) As parties entitled to a maritime lien, the bargeowners by the law maritime and the Mersey Dock Board under the Admiralty Jurisdiction Act, 1861, s. 7 (*The Veritas* (4)), all are on an equal footing, and though that lien gives a security arising at the commencement of proceedings in rem, the bargeowners gain no advantage over the Dock Board by being first in the field with their writs. "The true view is . . . . that the Court holds the property, not only for the first plaintiff, but also for at least all creditors of the same class who assert their claims before any unconditional decree is pronounced": per Jeune P., *The Africano.* (5) The Board's right of detention is a remedy only; it does not promote the cause of action for the damage to a higher degree than that of the bargeowners for the same damage. It is not like the

(1) 4 R. 725.
(2) 3 K. & J. 446.
(3) [1897] P. 178.
(4) [1901] P. 304.
(5) [1894] P. 141, 149.

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Crown's claims for stores lost in collision, which, though the right is generally waived (*The Zoe* (1); *The Winkfield* (2)), is a truly prior right and can be asserted in the limitation proceedings as such, though it can also at the choice of the Crown be asserted outside them. If, as Lord President Inglis says in *Burrell* v. *Simpson & Co.* (3), limitation of liability is "a case of statutory insolvency," which, if not an exact, is a very telling description of it, what the appellants must show is either a higher claim for the damage done and not a mere additional remedy for a claim of the same degree as the barge-owners' claims, or else a charge on or a property in the distributable fund itself.

The appellants rely for this on their private Act. What then is s. 94 of the Act of 1858? Its meaning will be best ascertained by considering it as at the time when it was passed, for nothing has been enacted since to extend it. The right to recover "the amount of such damage" is, of course, a right not given by the section, but arising independently of it. It was a right to recover the full amount, though since 1900, if the shipowners claim and get limitation of their liability, it is admittedly a right only to recover a part of it, when the whole exceeds the statutory limit. The case for which it provides—that of damage to dock property by the negligent handling of a ship—was one for which the common law already provided an ample cause of action, but the procedure to be followed was that of an ordinary trial with a jury. To give a permissive remedy by summary proceedings before a justice was no doubt a boon to the Dock Board. That procedure, however, involved personal service on the party proceeded against, and an alternative right to detain the ship no doubt gave a further advantage, but no word so far is to be found in the section to enlarge or qualify the cause of action; so far nothing is provided but the means of enforcing the pre-existing right, whatever it might be.

First of all, detention is a bare right to detain. There is no pledge, no charge, no right ad rem, no power to sell, no

(1) (1886) 11 P. D. 72. (2) [1902] P. 42.
(3) (1876) 4 R. 177, 182.

power to any Court to order a sale. It has been said that the section gives a possessory lien. It may well be questioned whether the section gives such possession as would enable the Board to bring trover or would justify an indictment, laying in the Board the title to articles stolen from the ship's equipment. The obligation of the Board to go to expense in protecting the ship, while detained, would raise another question. I wish to keep the point open, since it is not now necessary to decide it, whether what is called in the section detention authorizes what the law knows as possession. Nothing, at any rate, is said about dispossessing the owners' servants, and the detention, provided in s. 253 of the same Act, seems clearly not to involve any such right. The point is of some importance, for s. 688 of the Merchant Shipping Act enables property owners, when their property has been damaged by a foreign ship in circumstances like those of the present case, to obtain a judge's order, directed to sheriffs and others, to "detain" the ship when found in a British port, until satisfaction is made or security given in respect of the injury, and, although I recognize the distinction between a power given to the injured property-owner himself and a power given to a public officer, it is open to question whether the same word "detain" can have a different meaning on this ground alone, as it is equally a mode of enforcing a cause of action, whether it is a power to detain given to a public official for the protection of a private claimant or is a power given to the claimant himself.

The case of *The Emilie Millon* (1), decided upon s. 253 of this private Act, and cited, as I understood, as an authority in favour of the appellants, appears to me on the contrary to show how limited the operation of this right to "detain" really is. In that case the Court of Appeal held in terms that under the word "detain" the Board had only the right to refuse to grant "the vessel a clearance and, consequently, to detain her—to keep her in the docks—let her ownership, legal or equitable, and the liens upon her be what they might." The judgments expressly say that the section conferred no

(1) [1905] 2 K. B. 817.

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claim on any fund, even though that fund, being the proceeds of the sale of the ship under an order of the Court in an action in rem, "represented" the ship in the highest sense in which that term can be used, and they say also, that the Board derived no priority under the section over the claims of those who had a maritime lien against the ship for wages. In brief the section gave an absolute right, outside of the power of any Court to enforce it, to be exercised by the Board at its own hand and without interference by anybody, to immobilise the ship indefinitely, unless and until the dues should be paid. Apply that reasoning to s. 94. It draws a broad line between a remedy under the section and a claim in the limitation suit to have priority upon a fund, which had not been paid in to obtain the release of the ship from a lien, but had been paid in to obtain release of the shipowners from personal liability. If the Board has released the ship without getting a deposit placed in its own hands in terms of the section, that is its affair. If it has asked for or has acquiesced in payment of the amount into Court instead of to the credit of the detinue action, it does not gain thereby any right against strangers, which the section itself is powerless to give. As it happens, the claim for damage to the dock gates exceeds 8*l.* per ton of the ship, but, if it had been otherwise, the sum paid into Court in the detinue action would have differed from the sum deemed to be in Court in the limitation action, and the distinction between the two funds would have been apparent on the face of them. The fund to be deposited under the section is the ransom of the ship, and only since 1900 could it possibly have been identified with the fund, which is the aggregate amount of the shipowners' liability under the Merchant Shipping Act. The fund to be paid into Court in the limitation action is a distributable fund, over which in no event could the Board exercise the only right of sharing in it which s. 94 gives—namely, the right to spend it in repairs. I cannot see how these two different funds can be identified by saying that they "represent" the ship.

My Lords, the Mersey Dock Board took over older docks

at Liverpool and Birkenhead under the Acts of 1857 and 1858, but, after examining those Acts, I cannot find that the Harbours Clauses Act, 1847, was made applicable to the undertaking. It may, however, be worth noting that ss. 74 and 75 of the General Act are just as far from supporting the appellant's claim as s. 94 of the Mersey Dock Act of 1858 is. They provide for detention of a ship, which has done damage to dock property, till security for the damage is given, and for summary proceedings before justices, who are empowered to distrain the ship till the amount of the damage awarded by them is paid. Such was the general policy of the Legislature in these matters in the middle of the last century. The object of detaining or distraining a ship was to secure or to discharge the liability for the damage done, but the amount and the nature of the liability remained to be fixed otherwise, and, if the right to be paid was one which itself enjoyed no priority over the similar right of others, similarly circumstanced, in one and the same transaction, none of these ancillary or remedial provisions can supply a priority over the others and so interfere with equality of distribution among all.

My Lords, what can the Board do if it detains the ship? Nothing at all, unless the owners for their part first take action. Except as a means (often highly effectual) of bringing pressure to bear on the shipowners, detention of the ship results in nothing. When the money is deposited it does not "represent" the ship, against which, when the section was passed, the Dock Board had no remedy in rem; it represents the amount claimed to be contingently due from the shipowners, a representation in quite another sense.

If the vessel is badly damaged, the owners may not think it worth while to release her. They may pay the damage claimed and then the right to detain ceases, whatever the damage may ultimately turn out to be, or they may deposit the amount claimed with the Board and then either pay the damage and get back the deposit, which seems a roundabout thing to do, or give a notice disputing the

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claim, in which case the dispute will have to be tried. Only if the damages are not paid and no notice is given can the Board do anything with the money deposited except retain it, and even then, if the Board applies it in making good the injury done to its property, it must return any residue that may be left over when that has been done. It is only at this point that the idea of a security, properly so called, emerges, as distinguished from a mere means of constraining the shipowners to facilitate a settlement of the claim. It appears to me that the whole section is pure procedure and adds nothing to the cause of action, which it is to help to enforce. The liability remains as it always was, that is, a personal liability in tort for unliquidated damages, and nothing is provided which assimilates it to a specialty debt taking priority over other similar claims, or which gives the Board any security over any fund within the jurisdiction of any Court, which it can charge or bind or release. This right to detain is not equivalent to an arrest and is not a proceeding in rem. The money in the Board's hands is not equivalent to money paid into Court. If the Board continued to detain the vessel after the amount claimed had been deposited or paid, the owners' remedy would be an action of detinue and would not be anything in the nature of a redemption action.

Consider on the other hand what a limitation of liability action is. If the shipowners do not choose to bring it, no one can compel them to do so. If they choose to admit and pay the bargeowners' claims, the Board cannot prevent it, and, since 1900, if they choose to bring an action for limitation of liability and to make the Board a defendant, as they did, there is nothing, as far as I can see, to prevent it either. Of course the Board may go on detaining the ship, but, if the shipowners brought the 8*l.* per ton into Court in the limitation action and declined to take any step to release the ship, they would be entitled to their decree for limitation. The Board could only claim unliquidated damages in the limitation action, and on getting a decree for its rateable share of the fund in Court could, as it seems to me,

have no further right under s. 94 to detain the ship, for in terms of that section the right is only to detain until such damage shall have been paid for, and paid the Board would have been to the extent now allowed by law.

In *The Veritas* (1) Gorel lBarnes J. makes some observations, which seem to me to support the view of s. 94 taken above. The *Veritas* (like the *Countess*) had done damage to the Dock Company's landing stage and herself became a wreck. Under s. 94 the Board could detain and under s. 11 of its Act of 1874, as amended by s. 29 of its Act of 1889, could remove and sell her, and did so, receiving the proceeds. Other parties also claimed. "It is to be observed," says the learned judge, "that in selling under its statutory powers the Board do not extinguish the claimants' claims altogether against the proceeds, but hold the same subject to such rights as could be enforced against the res . . . . and, although they had an option to detain the wreck until their damage was paid or a deposit made for the same, that appears to be only an additional right." The learned Judge then dealt with the question of priorities and, although he pointed out that the Board had a maritime lien for the damage, it is noticeable that he nowhere suggests that, in respect of the right to detain under s. 94, it had any possessory lien at all or that, if it had, such a lien could have availed it in any question of priorities beyond what might be recoverable by action, if no priority were involved.

It was argued, without defining the term, that the money in Court is "substituted for" or "represents" the ship, but in what sense? A sum brought into Court in a limitation of liability action does not "represent" the vessel; it may, and in this case would, represent a great deal less than the vessel. It represents and is the aggregate liability of the shipowners to all the parties they have injured. In the present case, what was brought into Court under the order of the Court of Appeal in the detinue action, was not brought in under the terms of s. 94, which only provide for deposit in the Dock Board's hands. The order was, in part at least,

(1) [1901] P. 304, 308.

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a consent order and, if there was jurisdiction to make it, at any rate it does not bind strangers to that action, nor can an order to credit it to the limitation action be made, so as to limit the rights of persons, who claim in the limitation action only. In truth, this point does not help the appellants, unless the money brought into Court in the detinue action, to which the bargeowners were not parties, is, as the appellants aver, to be deemed at the same time to be in Court in the limitation action, to which they are parties, and also to be the deposit provided for by s. 94, which has to be paid to the Board and not into any Court. Even so, it does not avail, unless, further, s. 94 enlarges the Board's cause of action, either by charging the money and making it the Board's own money by way of security, or by giving the Board a right to have it applied to satisfy its cause of action, as limited by the Act of 1900, s. 1. The section occurs in a private Act, and is not to be extended in favour of the promoters of the Act by any implication beyond what it says. It was enacted at a time when a harbour authority, as a claimant for damage done to dock structures, had no connection with suits for limitation of liability, and naturally its terms give a harbour authority no right in or charge on the money paid into Court in such suits. Neither does the Act of 1900. That sum is in principle a sum to be distributed among all parties injured. A party, who claims that it is to be handed over to himself instead, must find clear words in some statute to that effect, for the whole matter originated in and is regulated by statute, but, so far from the money deposited with the Board under the section being available for the purpose of enabling it to pocket more than it could obtain, if the shipowners chose to sue for the limitation of their liability, I think that under the section there are cases in which the Board might have to refund part at least of the deposit, even though it received no satisfaction of its claim at all.

Let me put two such cases. Suppose first, that the ship is being navigated under a demise charter, so that the negligent captain is not the servant of the shipowners at all. Did the section mean that a justice of the peace could make an order

for payment of damages against persons who did not employ the captain and to whom the maxim respondeat superior did not apply? Surely not. A charterer by demise was not an owner within s. 503 (*The Hopper No.* 66 (1)) till the Merchant Shipping Act of 1906 expressly made him so, but nothing has extended s. 94 of the Mersey Docks Act, 1858, in this respect. The alternative remedy against the ship can carry the Board no further than a common law action or an appeal to summary jurisdiction would take it against a defendant, and, if the owners deposited the money and disputed the claim, the Board would in the end be compelled to return the deposit. Again, if the owners of 31/64ths, dissenting from the views of the managing owner, took the necessary steps to dissociate themselves from all his acts, including the appointment of the captain, here again, though part-owners, they would not be liable in personam for the captain's negligence, and if, to obtain the liberation of the ship which in part belonged to them, they were forced to make a deposit, I apprehend that they could obtain a return of what they had deposited under duress, whether the co-owners, who had employed the captain, were solvent or not, and the Board would have to be content with executing any judgment against the 33/64ths. If so, the only result of detaining the ship under the section, which has to be a detaining of the whole ship, since it is indivisible, beyond of course the barren satisfaction of keeping her in dock indefinitely, is to compel some one to deposit money, which can only be made available to the extent to which a right of recovery can be established in an action.

I think the nett result is this. Down to 1900, so far as such a case as this is concerned, the law stood as it did in 1858 and the Merchant Shipping Acts had nothing to do with it. The Act of 1900 extended to this case both the limit of the shipowners' liability and the machinery of the limitation of liability action. That Act has been called a parliamentary bargain, but we are not concerned with that; we are construing a public general statute, not a contract inter partes,

(1) [1906] P. 34.

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and this at least is clear, that we cannot assume an unexpressed intention of the Legislature to compensate the Dock Company for losing its right to full damages against the shipowner, who is vicariously to blame, by allowing it to take away altogether any relief from the other shipowners, who are not to blame at all. When a statute means to rob Peter to pay Paul it must say so.

My Lords, the Board continues to enjoy its special remedies under s. 94, but what do they now amount to? It seems plain that nothing more can be got through summary proceedings before a justice than the Dock Board is entitled to get in actual contemporaneous limitation proceedings, and the police court proceedings must therefore be stayed. What more is to be got in the alternative event? By continuing to detain the ship the Board may have some security for the satisfaction of the amount adjudged to it in the limitation action, but the matter is purely academic, for the money itself is ex hypothesi under the hand of the Court.

If, but only if, the shipowner forgets to give notice of dispute, there may seem to be some chance of the Board's being better off than the bargeowners are, for then under s. 94 it might wait seven days and thereafter proceed to spend the deposit in repairing the damage in full. How matters would then stand it is not necessary to decide beyond saying this, that I cannot see how in that event the bargeowners, who are strangers to the whole matter, could suddenly be worse off in the limitation action than they were before. I should have thought that, having placed themselves in that position, the shipowners must either find some way of recovering the appropriate part of their deposit from the Board, as money paid under a mistake of fact or otherwise, or else lose it, for the Merchant Shipping Act does not limit their liability for their own defaults in procedure; but, be that as it may, the event, improbable in itself, is quite outside of the limitation of liability suit, in which the shipowners have to make available for the Court's order 8*l.* per ton, whatever may have become of the ship, if they are to get a chance of limitation at all.

On s. 504 of 1894 I think that *Julius* v. *Bishop of*

Oxford (1) is rather beside the point. The section doubtless empowers the Court and the judge "may" exercise that power, but he must do so when duly invoked, and he must do so according to law. If the Board has a legal right to be satisfied in priority to the bargeowners, the Court may not satisfy the bargeowners in derogation of that right; if the Board has not that legal right, "rateably" can only mean pari passu. The whole question is whether the Board has that right. The Court "may" distribute among all; the Board has to show some right in itself to say that the Court "may" not do anything except pay the whole fund to the Board itself without any distribution. Sect. 94 is the sole alleged foundation for it. It is not enough to say that the right to detain remains, for the question is "to detain what for"? and I think that the answer is "to detain as an additional remedy towards enforcing some legal right existing independently of section 94" and that right is, in the events which have happened, only a right to a rateable share. If so the appeal in the limitation action fails.

As to the detinue action I think the shipowners have done much to confuse this litigation by bringing it at all, so far as the collision is concerned, since the issue could equally well have been raised by appealing from the order of Hill J. in the limitation action. As, however, the Merchant Shipping Act clearly means that the shipowners are liable for an amount of 8*l.* per ton only, the question in the detinue action can only be one of costs, and I need say no more. I think this appeal fails also.

LORD PHILLIMORE (read by LORD SUMNER). My Lords, this is a difficult case; but upon reflection I conclude that it may be determined by the statement of three propositions.

(1.) The right of the Mersey Docks and Harbour Board was to hold the ship as security for the amount of their lawful claim in respect of damage done to their dock. What that amount might be would in ordinary cases of dispute be determined in an action between the parties. The shipowner

(1) 5 App. Cas. 214.

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might tender what he deemed a sufficient sum, and if it were refused bring an action of detinue, or the Board might sue the shipowner upon his liability at common law, in which case the amount recovered would have no relation to the value of the ship detained. It would neither be diminished nor enhanced by any such consideration. To repeat, the Board took the ship not as a step in proceedings for determining their lawful claim but as security for their claim when lawfully determined. And security in itself is not priority.

(2.) The case before the House is not the ordinary case. The right to limit liability given by the Act of 1900 comes in, and it is agreed that the extent of the liability of the shipowner to all persons, including the Board, who were injured by the negligent act of his servant, is, inasmuch as there was no personal fault or privity, limited to a sum equal to 8*l.* per ton of the ship's registered tonnage without deduction on account of engine-room (i.e. to 4468*l.* odd). That is the measure of the liability of the shipowner to every one, and into this question again the value of the ship detained does not enter either by way of diminution or enhancement.

Now the shipowner having this concession of a reduction of liability made to him by statute is not given it in name only. The law gives and must give him the means of availing himself of it.

If there is only one claimant it will suffice for the shipowner to pay into Court the statutory sum with a plea asserting that there was no actual fault or privity on his part. But if there are more claimants than one, how is he to proceed? He cannot pay the first man in full and plead that payment in bar to the next comer. Such an idea has never even been suggested since limitation was enacted by 53 Geo. 3, c. 159. He could not safely pay the first what he esteemed to be his pro rata share, for he might not know at the time how many claimants were to follow, nor might he know that later claimants might not successfully contend that the first claimant had exaggerated the sum due to him, or indeed had nothing due to him. He would be bound to institute some form of procedure in the nature of interpleader by which all

claimants to a fund which he placed in medio would establish their claims and the amounts severally due. If s. 504 of the Merchant Shipping Act, 1894, and the corresponding section in earlier Acts, had not existed, the Courts would have been obliged to invent some form of procedure for the same purpose.

I do not therefore think that it much matters whether the Act of 1900 incorporates s. 504 of the Act of 1894 or not. If it does not, there must still be by the reason of the thing an analogous procedure. The inconvenience which would otherwise arise would amount to a denial of justice. Take the present case, and merely modify it by assuming that the amount of damage done to the dock was in dispute and that the bargeowners contended that it was much less than 4468*l*. The shipowner could not safely pay the Board the sum claimed, and as the Board could not be expected to release the ship unless their claim so far as it could be lawfully enforced was paid, the shipowner would have to get the claim assessed in the presence of the bargeowners, that is in some form of litigation to which the bargeowners as well as the Board were parties, and where the bargeowners could bring forward their objections, they being the only parties interested in having the claim of the Board lawfully determined.

The shipowner must for his legitimate protection bring proceedings for limitation, and he is therefore entitled to bring them. Proceedings of this nature are the only proceedings by which he and the bargeowners can get justice. I should hold this independently of the language of the statute of 1900, but I think it would be safe to say that the word "limitation" in s. 1 of that Act means or includes the process of limiting, that is the process of ascertaining and working out the shipowner's defence of limited liability.

If this be so, the second proposition is established. The shipowner has a right, which he will exercise, of instituting proceedings to limit his liability, and to these proceedings he may, and for his own sake must, make parties all claimants

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including the Board. As counsel for the respondent shipowners put it in his short and able argument, the amount for which the security taken by the Board is to stand must be determined in the limitation action, and in that action the Board must put forward its claim and have its value determined.

Lord Phillimore.

(3.) The third stage in the argument is not difficult. Among the various claimants the amount is to be distributed "rateably." This is language not used for the first time. It appears in the Merchant Shipping Act, 1854 (if not earlier), and has uniformly received the same construction, and the Legislature in passing the Acts of 1854 and 1900 must be taken to have had knowledge of *Leycester* v. *Logan* (1), of *The Crathie* (2), and of the other cases cited in argument, which show that neither priority of suit and judgment (though this priority in the ordinary case of several actions in rem where the res is deficient should by the Admiralty rule give preference to the prior petens) nor maritime lien nor payment under compulsion of a foreign Court of Justice, nor mistaken over payment is allowed to interfere in any way with the mathematically rateable division of the fund; and if it be said that s. 504 is technically inapplicable still the analogous procedure must be governed by the ordinary rules of equity practice established for bankruptcy and for the administration of the insolvent estates of dead people, the well-established principle to which Younger L.J. refers in his judgment—Equality is equity.

Then it is said what advantage does the Board gain from its statutory right to seize and hold? If by this be meant, what advantage does it gain over other claimants? the answer is none. Why should it? The security is not given to it in order to assure priority. It is given to prevent the ship sailing away without paying what is due from the shipowner. There is no indication in the Board's Act of competing claims or competition coming under consideration at all. The advantage which the Board has gained is that the payment by the shipowner of all that he can be made to pay

(1) 3 K. & J. 446. (2) [1897] P. 178.

is assured. The benefit in the particular case is limited to a quota; but without the security, there might have been no quota.

In my judgment these appeals fail.

[The terms of the Order as finally settled were not accessible at the time of going to press. They will be supplied in the next issue.]

Solicitors for the appellants: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitors for the respondent bargeowners: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents, owners of the steamship *Countess*: *Charles Lightbound & Co.*

[HOUSE OF LORDS.]

GOVERNMENT OF KELANTAN . . . APPELLANTS;

AND

DUFF DEVELOPMENT COMPANY, LIMITED . . . . . RESPONDENTS.

H. L. (E.)* 1923 *March* 22.

Arbitration—Construction of Deed—Award—Finality—Error on Face of Award—Evidence of surrounding Circumstances—Admissibility—Implied Covenant—Sovereign State—Objection to Jurisdiction—Appeal—Competency.

Where a question of construction is specifically referred to arbitration the decision of the arbitrator on that point cannot be set aside because the Court would have come to a different conclusion, unless it appears on the face of the award that the arbitrator has proceeded illegally; e.g., that he has decided on evidence which is inadmissible or on principles of construction which the law does not countenance.

Adams v. *Great North of Scotland Ry. Co.* [1891] A. C. 31 and *In re King and Duveen* [1913] 2 K. B. 32 applied.

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* *Present:* VISCOUNT CAVE, L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD TREVETHIN.

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Landauer v. *Asser* [1905] 2 K. B. 184 considered and distinguished.

An arbitrator, in construing a deed, is entitled to have regard to the surrounding circumstances, not only for the purpose of making intelligible the terms of the deed and of applying them to the facts, but also for the purpose of implying in the deed a covenant which is not expressed therein, provided that the implication is not inconsistent with the express terms of the deed.

Knight v. *Gravesend and Milton Waterworks Co.* (1857) 2 H. & N. 6 applied.

By an indenture made between the Government of Kelantan and an English company, as part consideration for the cancellation of a previous concession to the company, the Government granted to the company certain portions of the State lands and certain mining rights, and the deed contained a reference to arbitration. A dispute as to the construction of this deed was referred to an arbitrator, who decided against the Government, and a motion to set aside his award was refused by Russell J. and by the Court of Appeal. After the decision of the Court of Appeal the company applied for a garnishee order against the property of the Government of Kelantan in this country for the amount of the costs in relation to the proceedings for setting aside the award, and for an order to enforce the award. The Government objected that, being a sovereign independent State, it was not subject in respect of its public property to the orders of the High Court, and the objection was upheld by Russell J. and the application was refused, and on appeal this decision was affirmed.

The Government having appealed to the House of Lords against the refusal of the Court of Appeal to set aside the award, a preliminary objection to the competency of the appeal was taken at the Bar of the House on the ground that the appellant Government could not at the same time repudiate the jurisdiction of the British Courts and appeal to those Courts for relief.

Objection disallowed on the grounds, (1.) that it was made too late, and (2.) that adequate security had been given for the costs of the appeal.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Russell J.

The following statement of facts is taken from the opinion of the Lord Chancellor :—

" By an indenture dated July 15, 1912, and made between the Crown Agents for the Colonies on behalf of the Government of Kelantan of the one part, and the respondents, the Duff Development Co., Ld., of the other part (which has been referred to in these proceedings as ' the Deed of Cancellation '), after a recital showing that the respondents were entitled under an agreement with the Ruler of Kelantan to certain rights and privileges over certain districts in that

State (which were referred to as 'the Concession'), and after a recital that 'it was the intention of the Government to make certain railways and roads in and through the Concession,' it was agreed that the existing agreement should, as from December 31, 1912, be cancelled in consideration of a payment by the Government to the respondents of sums amounting to 300,000*l.*, and for the other considerations appearing in the Deed. The following clauses of the Deed are material on this appeal:—

"'4. The Government will (subject as hereinafter provided) grant to the Company the sole right of selecting to hold in perpetuity at a yearly quit rent of 25 cents per acre such blocks of State lands within the Concession not exceeding in the aggregate 50,000 acres as the Company shall select Provided that (A) the blocks shall be selected within 12 calendar months after the Government shall have delivered to the Company a plan showing the definite line of route proposed to be adopted by the Government for a railway intended to be made by the Government from Pahang to Siamese Territory through the Concession or part thereof such plan to be delivered as soon as the general line of route has been settled Provided that the Government shall be at full liberty in constructing the said Railway to make all such deviations from the line of route shown on the said plan as may be thought fit. . . . .'

"'8. The Government will also if required by the Company so to do at any time after the construction of the Railway referred to in Clause 4 shall have been completed up to a point on a line running East and West through Manson's Shaft grant to the Company (subject as hereinafter provided) an exclusive licence for a period of five years computed from the date when the construction of the said Railway shall have been so completed (of which date the certificate of the Government's Engineer in charge of the works shall be conclusive evidence) to prospect for minerals over the area within a radius of five miles from Manson's Shaft with the right to call for a mining lease or mining leases for a term or terms expiring on the 10th day of October 1940 of any

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lands to be selected by the Company within that area not exceeding in the whole 3000 acres.'

" ' 18. The Government will within four years from the date hereof make a cart road within the Concession from a point upstream of Kuala Tui to the Railway referred to in Clause 4 in such line or route of such materials and mode of construction as the Government may think fit and the Company shall surrender and give up or cause to be surrendered and given up to the Government without any compensation whatsoever a strip of land one chain wide for the purposes of such road to over or in relation to which the Company or any person claiming under it may be entitled or have any right title or interest under these presents or any grant lease or licence made or to be made hereunder.'

" ' 21. Any and every dispute difference or question which shall at any time arise between the parties hereto touching the construction meaning or effect of these presents or of any clause or thing herein contained or the rights or liabilities of the parties hereunder or otherwise howsoever relating to the premises shall be referred to the arbitration of a sole Arbitrator to be agreed upon between the parties or failing agreement to be nominated by the Secretary of State for the Colonies for the time being and this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply so far as applicable.'

" The plan referred to in clause 4 of the deed of cancellation was duly delivered to the respondent company, and the company in pursuance of that clause selected certain blocks of the aggregate area of 50,000 acres. But neither the railway nor the road referred to in the deed was in fact constructed; and the company, alleging an obligation on the part of the Government to construct both the road and the railway, claimed damages from the Government for their breach of the stipulations in the deed. The parties being unable to agree upon an arbitrator, application was made to Lord Milner, the Secretary of State for the Colonies, to

appoint an arbitrator under clause 21 of the deed; and the Secretary of State by an instrument under his hand dated April 12, 1920, after recitals showing that the company claimed damages for the failure of the Government in accordance with the provisions of the deed of cancellation to construct a railway or to make a road as therein provided, and that such claim was disputed by the Government, appointed Sir Edwin Arney Speed to be the sole arbitrator to whom those matters of dispute should be referred. By the direction of the arbitrator pleadings were delivered, which showed clearly that the failure to make a railway and road was admitted, and that the only questions to be determined by the arbitrator were questions as to the construction and effect of the deed.

"The arbitrator's award was dated November 17, 1921, and was in somewhat unusual form. The arbitrator thereby declared that he had been pressed to state his views on the points of law raised in the proceedings, and that as to the alleged implied obligation on the part of the Government to build a railway his award was based on a full consideration of all the cases quoted in the arguments, including the cases of *Hamlyn & Co.* v. *Wood & Co.* (1), and *The Moorcock* (2), passages from which cases he quoted in the award; and proceeded: 'I am of opinion that any attempt to construe the Deed of Cancellation without taking into account (A) the natural features of the country wherein the obligations of the Agreement were intended to be performed and (B) the position of the parties and the circumstances attending the preliminary negotiations and the conclusion of the Agreement must lead to a construction which involves a failure of consideration which cannot have been within the contemplation of either party and will rob the transaction of such efficacy as both parties must have intended that at all events it should have.' And the arbitrator found and awarded as follows: '(1.) That the Government was by the express terms of the Deed of Cancellation under contract to construct a cart road within the Concession from a point upstream, i.e., south

(1) [1891] 2 Q. B. 488, 491. (2) (1889) 14 P. D. 64, 68.

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of Kuala Tui to a railway running from Pahang to Siamese Territory within a period of four years from July 15, 1912. (2.) That it was an implied term of the Contract that the said road should commence on the west side of the river should proceed in a northerly direction and should have its terminus on the line of the said railway and within the Concession. (3.) That it was an implied term of the Contract that the said railway should be constructed within the time limited for the completion of the said road and should be so constructed as to admit of the construction of the said road having a terminus as aforesaid. (4.) That the Government has failed to fulfil the said terms of the Contract and that by reason of such failure the Company has suffered damage and I direct an inquiry as to the nature and amount of such damage.'

"On December 22, 1921, the appellant Government served upon the respondents notice of a motion in the Chancery Division of the High Court of Justice, asking that the award might be set aside on grounds which were stated as follows: '(1.) That there is error of law appearing on the face of the award. (2.) That the Arbitrator has wrongly construed the Deed of Cancellation referred to in the award. (3.) That the Arbitrator has wrongly implied terms of and in the said deed as set out in his award. (4.) That in construing the Deed of Cancellation the Arbitrator has wrongly taken into account "the circumstances attending the preliminary negotiations and the conclusion of the Agreement." (5.) That the Arbitrator wrongly received evidence of the said circumstances.'

"The motion was heard by Russell J., who refused it with costs; and an appeal from his decision was also refused with costs. Hence the present appeal."

1923. Feb. 15, 16, 19. *Maugham K.C.* (with him *Hon. Stafford Cripps*) for the respondents took a preliminary objection to the competency of the appeal. The respondents object to the competency of the appeal on the ground that the Sultan of Kelantan has set up his sovereignty in answer to a claim to enforce the award. After two Courts had

refused to set aside the award and costs amounting to over 5000*l.* had been incurred, the respondents obtained a garnishee order nisi attaching all debts due from the Crown Agents to the Government of Kelantan to answer the two orders made against that Government in moving to set aside the award, there being at that time a sum of 1700*l.* in the hands of the Crown agents as agents for the Government of Kelantan, and they then applied for an order on the garnishees for payment of that sum to answer their claim for costs. The motion was opposed on the ground that, Kelantan being an independent sovereign State, the Court had no jurisdiction to execute the judgments by a levy on the property of that State. Russell J. held that the Sultan of Kelantan had not submitted to the jurisdiction of the Court for the purpose of having execution levied against him, and his decision was affirmed by the Court of Appeal, from whose decision there has so far been no appeal to this House. No case can be found in which an appellant has been heard in this House where the circumstances are such that if the order is made in his favour he will get the benefit, whereas if the order is made against him he will set up his sovereign rights. The respondents are asking that they shall not be forced to take part in a proceeding on wholly unjust terms. If an independent sovereign comes before this House asking that an award made against him shall be set aside and has at the same time obtained an order that the award is not enforceable against him by reason of his sovereignty, he ought not to be heard unless he waives his sovereignty to the extent of having execution levied against him. This House will not entertain an appeal to set aside an ineffective judgment.

Upjohn K.C. (with him *W. E. Vernon*) for the appellants in answer to the objection. This objection is made for the first time after the costs of printing the record have been incurred and after counsel have been briefed. It should have been taken before the Appeal Committee and an application to stay the appeal should have been made. Whatever the merits of the objection the respondents have forfeited their right to bring forward this point by reason of its not

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having been advanced until all the costs of this appeal had been incurred. As to the merits, there was no abdication of sovereignty by entering into a contract containing a submission to arbitration. That is merely an appeal by the parties to their own domestic tribunal, and the subsequent applications to the Court were nothing more than a term of the submission by virtue of the reference to the Arbitration Act. These orders were merely an extension or prolongation of the arbitration. When, however, an application was made under s. 12 of the Arbitration Act to enforce the award in the same manner as a judgment of the High Court that did involve an abdication of sovereignty. In any case the award is not waste paper, because it can be enforced indirectly through the Colonial Office or it may be enforced in the Courts of Kelantan. The proper course of the respondents was to have applied for security for costs. This was not done in the Courts below, but in this House the sum has been fixed at 700*l.*, and in fixing this amount the position of the appellant Government must have been taken into consideration. In the appellants' submission it is not competent to the House to decline to hear the appeal until the appellants have complied with every term of the order which is the subject of the appeal. He referred to *The Newbattle*. (1)

Maugham K.C. in reply. As to the delay in making the application the respondents were not in a position to say that the waiver of the Sultan's sovereignty was limited in the way in which it has now been held by the Court of Appeal to be limited until that point was so decided. As to the enforcement of the award in Kelantan there is no pretence for saying that there is any system of civilized law in that country.

[VISCOUNT CAVE L.C. Their Lordships think that this appeal should be allowed to go on. They will give their reasons for their decision on the preliminary objection later.]

Upjohn K.C. and *W. E. Vernon* for the appellants. The arbitrator has used evidence of external circumstances for wholly illegitimate purposes. Extrinsic evidence was

(1) (1885) 10 P. D. 33.

admissible only for .the purpose of explaining the sense in which the words of the deed were used and of enabling the arbitrator to apply such words to the subject matter. The implication of a covenant depends in every case upon the language of the instrument. It is not legitimate to raise an implication from the external circumstances of the case or from any speculation as to the possible or probable intention of the parties without regard to the language of the instrument. The arbitrator has admitted extrinsic evidence for the purpose of finding out what was the real consideration for which the parties were bargaining, what was the real intention of the parties, and, in order to prevent some supposed failure of consideration, he has made a brand new contract for the parties which was not expressed in or to be implied from the language of the deed, and which is in fact inconsistent with such language. The fact that the deed shows that the parties contemplated the building of a railway is no sufficient reason for implying a covenant to that effect. No external circumstances, whatever they may be, can in law entitle an arbitrator to imply a covenant. In any case evidence of the circumstances attending the preliminary negotiations and the conclusion of the agreement ought not to have been admitted. The preliminary negotiations cannot be looked at for the purpose of drawing an inference from the deed. Moreover, the arbitrator has wrongly construed the deed. In a general reference such as the reference in the present case the question of construction is a question of law for the Courts, and the award is open to review if the arbitrator has misconstrued the instrument. On all these grounds there was error in law on the face of the award and it ought to be set aside.

[On the question whether extrinsic evidence was admissible for the purpose of implying a covenant, they referred to *Baird* v. *Fortune* (1); *Grey* v. *Pearson* (2); *Wolveridge* v. *Steward* (3); *Rashleigh* v. *South Eastern Ry. Co.* (4); *Knight* v. *Gravesend and Milton Waterworks Co.* (5); *James* v.

(1) (1861) 4 Macq. 127, 149.
(2) (1857) 6 H. L. C. 61, 106.
(3) (1833) 1 Cr. & M. 644, 657–659.
(4) (1851) 10 C. B. 612, 632.
(5) 2 H. & N. 6, 11, 13.

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Cochrane (1); and on the question whether the decision of the arbitrator on the construction of the deed was open to review, to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Rys. Co. of London* (2); *Attorney-General for Manitoba* v. *Kelly* (3); *Landauer* v. *Asser* (4); *Doe* v. *Emmerson* (5); *Adams* v. *Great North of Scotland Ry. Co.* (6); *In re King and Duveen* (7); *Parsons* v. *Brixham Fishing Smack Insurance Co.* (8); *In re Nuttall and Lynton and Barnstaple Ry. Co.* (9); *Lyon* v. *Johnson* (10); *In re Carlisle* (11); *Bristol Corporation* v. *John Aird & Co.* (12)]

[VISCOUNT CAVE L.C. referred to *Randegger* v. *Holmes.* (13)]

As to the cases relied on by the arbitrator, in *The Moorcock* (14) there was no written contract, and a stricter rule applies in a case where there is a written contract; in *Hamlyn & Co.* v. *Wood & Co.* (15) Lord Esher does not permit a general inquiry into outside circumstances. The rule there laid down is not referring to outside circumstances at all, but must be taken in reference to the examination of the terms of the contract.

Maugham K.C. and *Hon. Stafford Cripps* for the respondents. On the question whether there is any appeal against the decision of an arbitrator on a question of construction: where the reference includes either a specific question of construction or questions of construction generally, that does not in the least show that the parties are seeking to oust the jurisdiction of the Court, but where in such a case an award has been made on a question of construction the true view is that the parties have agreed to be bound by the decision of the arbitrator, and there is no appeal from that decision on the ground that the instrument has been wrongly construed. Here the specific question of the construction of the deed was submitted to the arbitrator and his award

(1) (1852) 7 Ex. 170, 177.
(2) [1912] A. C. 673, 686.
(3) [1922] 1 A. C. 268, 283.
(4) [1905] 2 K. B. 184, 191.
(5) (1847) 9 L. T. (O. S.) 199.
(6) [1891] A. C. 31, 39, 43.
(7) [1913] 2 K. B. 32.
(8) (1918) 118 L. T. 600.
(9) (1899) 82 L. T. 17.
(10) (1889) 40 Ch. D. 579.
(11) (1890) 44 Ch. D. 200, 203.
(12) [1913] A. C. 241, 261.
(13) (1866) L. R. 1 C. P. 679.
(14) (1888) 13 P. D. 157; 14 P. D. 64, 68.
(15) [1891] 2 Q. B. 488, 491.

is final, and none the less because other questions were included in the reference. *Holmes Oil Co.* v. *Pumpherston Oil Co.* (1) and *Attorney-General for Manitoba* v. *Kelly* (2) contain all the law on the subject, and in the latter case the authorities are exhaustively discussed. *In re King and Duveen* (3) is directly in point. *Landauer* v. *Asser* (4) was, it is submitted, wrongly decided. As to the main point: the question what are surrounding circumstances is a question of fact for the arbitrator. It is impossible for the Court to go into evidence of that finding of fact, which is not before the tribunal. The award can only be upset if it is impossible to come to the conclusion at which the arbitrator has arrived, whatever the surrounding circumstances may be. It is sought to distinguish between surrounding circumstances for ascertaining the meaning of a doubtful clause and for implying a term, and it is said that a term can only be implied from the language of the deed as it stands without reference to the surrounding circumstances. The argument is that it is not permissible to look at the surrounding circumstances for the purpose of ascertaining whether there is an implied term. But the object of construing a deed by surrounding circumstances is to enable the contract to be understood as a whole, and it cannot be so understood unless an implied term may be inferred where that is a necessary implication. It is impossible to contend that the surrounding circumstances may not be looked at for that purpose. It happens in this case that the surrounding circumstances favour the inference of an implied term, but they might have precisely the opposite effect. There is no authority for saying that the surrounding circumstances may be looked at for the purpose of construing the written terms of the deed, but may not be looked at for the purpose of inferring an implied term. They may be used in order to ascertain what is the true effect of the contract as a whole. The term is an implication of the deed and that is pure construction. This contention is not inconsistent with any

(1) (1891) 18 R. (H. L.) 52, 53, 55.
(2) [1922] 1 A. C. 269, 281–283.
(3) [1913] 2 K. B. 32.
(4) [1905] 2 K. B. 184, 191.

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of the authorities cited by the appellants. Bowen L.J.'s observations in *The Moorcock* (1) are not confined to parol contracts, but are of general application, and in *Hamlyn & Co.* v. *Wood & Co.* (2) *The Moorcock* (1) was referred to on the question whether a term in a written contract should be implied. There is therefore no ground for the appellants' criticism of the arbitrator in reference to those two cases. It is conceded that the arbitrator cannot refer to the negotiations leading up to the deed, but he has not done so. He says he has had regard to the surrounding circumstances relating to those negotiations; he does not say he has had regard to the negotiations themselves. If the arbitrator takes a particular view of the contract by reference to the surrounding circumstances it is impossible to review his decision without examining facts which this House cannot examine. Apart from the question whether this House can review the decision of the arbitrator on the question of construction, there is here no error on the face of the award.

Upjohn K.C. in reply. The error complained of is error in going outside the deed, and on this the cases cited by the respondents have no application. For all purposes of construction and for all purposes of implication the Court may and must read the deed by the light of external circumstances. But if the implication is not to be got from the words themselves external circumstances cannot affect the matter.

The House took time for consideration.

1923. March 22. VISCOUNT CAVE L.C. My Lords, this is an appeal from an order of the Court of Appeal affirming an order of Russell J., who refused a motion to set aside an award. [His Lordship stated the facts and continued:] Upon the appeal coming on for hearing, a preliminary objection was raised on behalf of the respondents. It appeared that after the decision of the Court of Appeal upon

(1) 14 P. D. 64, 68. (2) [1891] 2 Q. B. 488, 491.

the question of setting aside the award, the respondents had applied to the Court for a garnishee order against the property of the Government of Kelantan in this country for the amount of the costs of the application and appeal (which exceeded 5000*l.*), and also for an order under s. 12 of the Arbitration Act, 1889, to enforce the award. In answer to these applications, the Government had contended that being a sovereign State it was not subject in respect of its public property to the orders of the High Court; and this objection had been allowed by Russell J. and on appeal by the Court of Appeal. Upon these facts the respondents contended that the appellant Government, having repudiated any liability in this country in respect either of the award or of the orders of the Courts in respect of costs, was precluded from now coming to any tribunal in this country (including this House) for an order to set aside the award. This contention was based partly on the view that the appellant Government could not at the same time repudiate the jurisdiction of the British Courts and appeal to those Courts for relief, and also upon the view that in the circumstances which had now arisen this appeal was an appeal for costs only.

My Lords, there was force in this objection. The position of a Government which at once repudiates the jurisdiction of a Court and appeals to it for protection, does not accord with one's sense of what is right and fair; and if the point could have been raised at an earlier stage—for instance, at the time when the application to Russell J. to set aside the award was made—I do not say (although it is not necessary to decide the matter) that effect would not have been given to it. But there was serious difficulty in giving effect to the objection as a ground for refusing to hear this appeal. There was an order of the Court of Appeal standing on record against the appellants and your Lordships were reluctant to deprive the appellants of the opportunity of asking to have that order reversed. Further, it appeared that a decision on this appeal would by no means be abortive. If the decision were in favour of the appellant Government, it

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would, of course, relieve it of a heavy liability; if against it, the decision would not only (as counsel for the appellant pointed out) make the award finally binding upon the parties in Kelantan, but would also be a strong ground for an application by the respondents to the Colonial Office (which controls the Government of Kelantan) to give directions for carrying out the award. Further, it was evident that if the orders of the Court of Appeal relating to the application for a garnishee order and for an order to enforce the award should be set aside on appeal to this House (as to which I say nothing), the appellant would, if this appeal were stopped in limine, be in the position of having the award and the orders for costs enforced against it and of having lost its opportunity of taking the opinion of the House of Lords on the merits of the case. Adequate security had been given for the costs of this appeal. Your Lordships accordingly decided—and I entirely agreed—that the objection must be overruled, and that the appeal must be heard.

Before dealing specifically with the points raised on the appeal, it is desirable to refer to a question which was mentioned (though not decided) in the judgments of the learned judges of the Court of Appeal and which was again raised in the argument before this House—namely, the question whether there was not here such a reference to the arbitrator on the construction of the deed of cancellation that his conclusions on that point must be accepted as final and not open to be questioned on application to the Court. My Lords, in my opinion there was in this case a reference to the arbitrator of the questions which had arisen on the construction of the deed of cancellation. The arbitration clause in the deed applied in terms to every dispute, difference or question which might arise between the parties touching the "construction, meaning, or effect" of the deed. The appointment of the arbitrator showed that differences had arisen as to construction, and the arbitrator was appointed to determine those differences. In the pleadings delivered in pursuance of the arbitrator's direction, the questions of construction were again clearly raised. Lastly, the appellants in their case

delivered for the purpose of this appeal (para. 13) stated that among the points to be determined by the arbitrator were: "(1.) What, upon the true construction of the Deed of Cancellation, was the nature and extent of the obligation of the Government in regard to the making of the cart road? (2.) Whether, upon the true construction of the Deed of Cancellation, the Government had entered into a covenant with the Company to construct the railway, and if so, in what terms, and what was the nature and extent of the obligation of the Government under such covenant?" The reference, therefore, was a reference as to construction.

If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose. The fact that under s. 4 of the Arbitration Act the Court has a discretion to refuse a stay of proceedings when a difficult question of law arises, or that under s. 19 of the same Act an arbitrator may be required to state a special case for the opinion of the Court on any question of law, is not material; for in this case no question of stay arose, and the appellants, though at one time disposed to ask for a special case, did not press their request, but left the matter for the arbitrator to deal with. This being so, it appears to me that, unless it can be shown by

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something appearing on the face of the award that the arbitrator has proceeded illegally, his award must stand.

The above view is fully supported by the authorities. In *Adams* v. *Great North of Scotland Ry.* (1) Lord Halsbury treated the point as settled. After referring to Lord Thurlow's judgment in *Knox* v. *Symmonds* (2), he proceeds: "And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. (3) In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions." To the same effect are the decisions of this House in *Holmes Oil Co.* v. *Pumpherston Oil Co.* (4) and of the Judicial Committee of the Privy Council in *Attorney-General for Manitoba* v. *Kelly* (5); and in *In re King and Duveen* (6) Channell J. stated the rule concisely as follows: "It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside . . . . , but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator." The case of the *British Westinghouse, &c., Co.* v. *Underground Electric Rys. Co.* (7) is clearly distinguishable, as in that case the award

(1) [1891] A. C. 31, 39.
(2) (1791) 1 Ves. Jun. 369.
(3) *Doe* v. *Emmerson*, 9 L. T. (O. S.) 199.
(4) 18 R. (H. L.) 52.
(5) [1922] 1 A. C. 268.
(6) [1913] 2 K. B. 32, 35, 36.
(7) [1912] A. C. 673.

was set aside, not because this House differed from the opinion of the arbitrator on the question referred to him, but because that opinion appeared on the face of the award to be founded upon a previous decision of the Divisional Court, which this House considered to be wrong. *Landauer* v. *Asser* (1), on which counsel for the appellant mainly relied, was not a case of construction, and the point now under discussion does not appear to have been raised.

I come therefore to the conclusion that the award in the present case cannot be set aside only because the arbitrator may be thought to have been mistaken in his construction of the Deed of Cancellation, but only if it appears on the face of the award that he has proceeded on evidence which was inadmissible or on wrong principles of construction, or has otherwise been guilty of some error in law. Upon this footing two points are raised on behalf of the appellant Government.

First, it is said that the statement in the award that the arbitrator has taken into account "the circumstances attending the preliminary negotiations and the conclusion of the agreement" shows that he in fact took into account the negotiations themselves and drew from them an inference as to the contract by which the parties intended to be bound. If he did so, he was in error; but I do not think that the statement can fairly be so read. The circumstances attending the preliminary negotiations are different from the negotiations themselves; and although the phrase is not a happy one, I think it means no more than this, that the arbitrator had regard to the facts existing before and down to the date of the deed.

But it is said that, even so, it appears by the award that he has used his knowledge of those facts for a wrong purpose; that he was entitled to have regard to the surrounding circumstances for the purpose of making intelligible the terms of the deed and of applying them to the facts, but not for the purpose of implying in the deed a covenant which was not expressed therein. I know of no authority for so limiting

(1) [1905] 2 K. B. 184.

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the ordinary rule. No doubt surrounding circumstances may not be used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree; but if a judge or an arbitrator, knowing the terms of a deed and the circumstances surrounding its execution, is satisfied by those means that the parties intended by that instrument to agree to terms which, though not clearly expressed, are in his belief to be implied in it, there is no reason why he should not give effect to his opinion. This view is consistent with such authorities as *Wolveridge* v. *Steward* (1); *James* v. *Cochrane* (2); and *Hamlyn & Co.* v. *Wood & Co.* (3); and is in accordance with the statements of the law contained in *Knight* v. *Gravesend and Milton Waterworks Co.* (4) In the last-mentioned case Pollock C.B. said: "It is admitted that there is no covenant, in express terms, contained in the deed; but wherever it is manifest from expressions in a deed, that the parties must have intended to stipulate that a particular thing should be done by either of them, there is an implied covenant to do it. . . . . But in fact every case where a covenant is implied must stand upon its own foundation, and there is great difficulty in arguing from the analogy of other cases. The question always is, what is the reasonable conclusion to be drawn from all the matters to which the Court are entitled to look."

In my opinion, therefore, the first point taken on behalf of the appellants cannot be sustained.

But, secondly, it is argued that the conclusions of the award are inconsistent with the terms of the deed in two respects—namely, in the finding (in clause 2) that it was an implied term of the contract that the road thereby agreed to be made should proceed in a northerly direction, and also in the finding (in clause 3) that it was an implied term of the contract that the railway therein referred to should be constructed, and constructed within a given time. The finding that the road was to proceed in a northerly direction appears to me to be in no way contradictory to the terms of

(1) 1 Cr. & M. 644.
(2) 7 Ex. 170.
(3) [1891] 2 Q. B. 488.
(4) 2 H. & N. 6, 11.

the contract. The contract contains (as Warrington L.J. pointed out) a provision which to some extent points to that conclusion; and it may very well be that the evidence of the surrounding circumstances (of which this House has no knowledge) was such as to make it impossible to give any other construction to the deed. A stipulation that the road shall proceed in a northerly direction does not appear to me to be inconsistent with the express stipulation that its "line of route" shall be laid down by the Government.

The finding of the arbitrator that there is to be implied in the deed a contract to construct the railway has caused me more doubt; but upon the whole I have come to the conclusion that it affords no ground for setting aside the award. I might myself have experienced difficulty in finding such an implication in the contract; but this is immaterial, as the question is one of construction which (as I have indicated) it is for the arbitrator and not for the Courts to determine. The implication of a covenant to construct the railway is certainly not contrary to the Deed of Cancellation. There are provisions in the deed which cannot have full effect unless the railway is made; such, for instance, as the stipulation in clause 4 for the selection of blocks of land after the line of route of the railway has been settled, the provision in the same clause for deviations from such line of route, the stipulation in clause 8 for the grant of a mining lease after the construction of the railway has been completed, and the agreement in clause 18 to make a cart road to the railway within four years. These stipulations may not be enough by themselves to lead to an implication of a contract to construct the line; but I am not prepared to say that these considerations, coupled with evidence of facts of which the Courts know nothing, and into which they are not entitled to inquire, cannot properly have led the arbitrator to his conclusion. In these circumstances, I have come to the conclusion this this objection also fails.

For the above reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly. But I desire to add an observation

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which arises out of the preliminary objection taken by the respondents to the hearing of this appeal. Although that objection was overruled and the appellant Government was allowed to argue this appeal, I think it right to say that it is now incumbent on that Government and on the British Colonial Office, under whose directions it carries on its operations, to consider carefully whether and to what extent the plea of sovereignty can justly be insisted upon in order to prevent the enforcement of the award and of the orders of the Courts for payment of costs. The appellant Government has appealed to the British Courts to declare whether the award is binding upon it; and now that this question has been finally determined in favour of the respondents, it would not (I think) be creditable to the appellant Government (which claims the dignity of a sovereign State) that the respondents should be deprived by a technical plea not only of the fruits of that decision, but even of the costs of obtaining it.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree with the judgment which has just been read and with the considerations as to the working out of this case which have just been stated to the House by my noble and learned friend on the Woolsack.

LORD SUMNER. My Lords, I agree with the motion proposed from the Woolsack.

LORD PARMOOR. My Lords, a deed, referred to as the Deed of Cancellation, to which the appellants and respondents are parties, dated July 15, 1912, contains an arbitration clause in the following terms: "Any and every dispute difference or question which shall at any time arise between the parties hereto touching the construction meaning or effect of these presents or of any clause or thing herein contained or the rights or liabilities of the parties hereunder or otherwise howsoever relating to the premises shall be referred to the arbitration of a sole arbitrator to be agreed

upon between the parties or failing agreement to be nominated by the Secretary of State for the Colonies for the time being and this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply so far as applicable." It is important to note the direction in this clause, that any and every dispute at any time arising between the parties touching the construction, meaning or effect of the deed shall be referred to arbitration.

On April 12, 1920, Lord Milner, the then Secretary of State for the Colonies, acting under the authority of the above arbitration clause, appointed Sir Edwin Arney Speed, as sole arbitrator, to decide certain matters in dispute recited in the deed of appointment. So far as is material to the present appeal, the recital states that the respondents have suffered, and are suffering, and must continue to suffer material damage, and loss, and increased cost of working their estates and business, by means of the failure of the Government, in accordance with the before recited provisions of the Deed of Cancellation, to construct the said railway and/or to make the said road as therein provided, and that the appellants do not admit any of the claims of the respondents, as before recited, or any liability to the respondents in respect of non-construction, and making of the said railway, and/or the said road, and that a difference has therefore arisen between the appellants and the respondents within the terms of the before recited clause 21 of the Deed of Cancellation. It was agreed that the arbitrator should in the first instance determine the rights of the parties, leaving over, for future consideration, any question of damage. The arbitrator made his award on November 7, 1921, setting out the legal principles which he had adopted, and the heads of the evidence, which he had admitted. The appellants moved to set aside the award on grounds stated in an affidavit sworn on December 22, 1921. Russell J. dismissed the motion. This judgment was confirmed in the Court of Appeal.

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It has long been established, as a fundamental principle in the law of arbitration, that, so long as an arbitrator acts within his jurisdiction, and without fraud, or misconduct, an award cannot be set aside by a Court, unless there is an error in law which appears on the face of the award, or in some document so closely connected therewith that it must be regarded as part of his award, or unless the umpire states that he has made a mistake of law or fact, leaving it to the Court to review his position. My Lords, in any case it would hardly be necessary to quote authorities for the above proposition, but the whole matter was fully discussed in a recent case decided in the Privy Council: *The Attorney-General for the Province of Manitoba* v. *Thomas Kelly, Ld.* (1) It is sufficient to quote the following passage: "In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision: *Holgate* v. *Killick* (2); *Fuller* v. *Fenwick* (3); *McRae & Co.* v. *Lemay* (4); *Adams* v. *Great North of Scotland Ry. Co.* (5); *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (6)"

To the cases referred to in the above quotation may be added *Hodgkinson* v. *Fernie* (7), a case referred to by Lord Haldane in his judgment in the *Westinghouse Case.*

A passage from the same judgment in the Privy Council states, affirmatively, that an award can be impeached when an error in law appears on the face of the award, or on some document so closely connected with it, that it must be regarded as part of the award, if the question of law is not one which has been specifically referred to the arbitrator. (8)

(1) [1922] 1 A. C. 268, 281.
(2) (1861) 7 H. & N. 418.
(3) (1846) 3 C. B. 705.
(4) (1890) 18 Can. S. C. R. 280.
(5) [1891] A. C. 31, 39.
(6) [1912] A. C. 673.
(7) (1857) 3 C. B. (N. S.) 189.
(8) [1922] 1 A. C. 283.

"Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; but no such issue arises in the present appeal. In *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (1) it was held that where an arbitrator has made an award expressed to be made on the basis of an erroneous opinion given upon a special case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous."

It is not necessary to go into the very special conditions which arose in the *Westinghouse Case*, but, in my opinion, the present appeal does not depend upon the decision in that case.

It is not competent to examine extrinsic evidence for the purpose of determining whether an arbitrator has made an error of law, within the limits of his jurisdiction, and where there is no allegation of fraud or misconduct. The extrinsic evidence therefore considered by Russell J. should not have been admitted, and was properly rejected by the Court of Appeal. There are adequate remedies provided in the Arbitration Act of 1889. A Court by exercising its discretion under s. 4, or under s. 19, of the Arbitration Act, 1889, can ensure that in any proper case a matter of law may be brought for decision before the Courts, either at a preliminary stage, or before the arbitrator has made his award. In other words, an agreement to refer matters in dispute to an arbitrator does not deprive either party of his right to the decision of a matter of law in the Courts, should the judge or Court before whom the matter is brought be of opinion that, in any particular instance, this is the right course to adopt.

The principle applicable where a specific question of law has been submitted to the decision of arbitration is well expressed by Channell J. in the case of *In re King and Duveen.* (2) "It

(1) [1912] A. C. 673. (2) [1913] 2 K. B. 32, 36.

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is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator." The case of *Landauer* v. *Asser* (1) was referred to in the argument before your Lordships. It is not easy to understand the exact nature of this decision, but if the case purports to decide that, where a matter of law has been specifically referred to arbitration, it is competent for a Court to set aside the decision of the arbitrator, on the ground that his decision is wrong, it cannot, I think, be regarded as a valid authority.

In the present appeal it was argued by the counsel on behalf of the appellants that the question of the construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him. In my opinion this contention is not maintainable. Whether, however, a question of law has been specifically submitted to arbitration, falls in each case to be determined on the terms of the particular submission. If the Court, before which the award is sought to be impeached, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of a question of law directly submitted to the arbitrator for his decision then the principle stated by Channell J. in *In re King and Duveen* (2) applies, and the parties having chosen their tribunal, and not having successfully applied to the Court under either s. 4, or s. 19, of the Arbitration Act, 1889, are not in a position to question the award, or to claim to set it aside. I agree, however, with the Court of Appeal that it is not necessary to decide this issue in the present appeal, and that, whether the question of the construction of the deed has, or has not, been specifically submitted to arbitration, the statements set out by the arbitrator on the face of his award do not disclose any error in law such as would justify a Court in setting aside the award.

(1) [1905] 2 K. B. 184. (2) [1913] 2 K. B. 32, 36.

It is not necessary to set out at length the statements made by the arbitrator in his award, on which the appellants rely as disclosing error of law. The arbitrator says that he makes these statements, having been pressed to state his views on the points of law raised in the proceedings. In the argument before your Lordships the award was impeached under two heads: (1.) that in construing the Deed of Cancellation the arbitrator had wrongly implied terms; (2.) that he had wrongly admitted evidence of "the circumstances attending the preliminary negotiations and the conclusion of the agreement." It will be convenient to consider first the question of evidence. The counsel for the appellants asked your Lordships to draw the inference that the arbitrator had taken into account, not the circumstances attending the preliminary negotiations, and the conclusion of the agreement, but the preliminary negotiations themselves. I can find no warrant for this argument. It is not only placing a strained construction on the language used in the award, but further, as pointed out in the Court of Appeal, the point is not raised in the affidavit, which states the grounds on which it is sought to impeach the award. The evidence objected to is evidence which the arbitrator was not only entitled to, but bound to admit. A second objection taken was, that the evidence admitted had been improperly applied, in that such evidence, if admissible in the construction of the express covenants in the deed, was not admissible in the consideration, whether any terms should be implied.

In my opinion this distinction has no sound foundation, and would lead to the result that evidence, admissible in the construction of separate express terms in a contract, would not be admissible to the consideration of the construction of the contract taken as a whole.

The principle of law applied by the arbitrator in making implications is derived from the two well-known cases of *Hamlyn & Co.* v. *Wood & Co.* (1) and *The Moorcock.* (2) The latter case was criticised by the counsel for the appellants on

(1) [1891] 2 Q. B. 488. (2) 14 P. D. 64.

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the ground that the decision was given in the case of a parol, and not of a written, agreement. The often quoted passage from the judgment of Bowen L.J. is, in terms, expressed to be applicable to all cases. When once the terms of an agreement have been ascertained, and the consideration arises, whether, in order to carry out the intention of both parties, some further terms should be implied, there is no ground to apply a different test in making implications, whether the agreement is in writing or by parol. After considering the evidence the arbitrator holds that to attempt to construe the deed without taking into account the evidence he has admitted, must lead to a construction which involves a failure of consideration, and which cannot have been within the contemplation of either party, and would simply rob the transaction of such efficacy as both parties must have intended, that, at all events, it should have. Using the evidence, as he was entitled to do, the arbitrator came to the conclusion that certain provisions should be implied as to the direction and terminus of the road, and that the railway should be constructed within the time limited for the completion of the road, and should be so constructed as to admit of the construction of the said road having the aforesaid terminus. The evidence on which the arbitrator acted is not before your Lordships. Unless, therefore, it can be shown that no evidence could render the implied terms admissible, it cannot be said that there is an error in law on the face of the award. I see no way in which such an error in law could be established, irrespective of the evidence which is not before your Lordships, unless the implied terms are such that they are inconsistent with the express terms of the deed. I agree with the Court of Appeal that this position cannot be established, and think it unnecessary to repeat the arguments of the Master of the Rolls, with which I entirely concur. The counsel for the appellants called your Lordships' attention to a considerable number of cases which raise the question whether and how far implications could be made in the construction of a written document, but each of these cases depends on its particular facts, and the construction of the contract in one case affords

little or no assistance in the construction of a different contract in another case.

In my opinion the appeal fails and should be dismissed with costs.

I desire to add that the preliminary objection was one which I think the House should not have entertained on the hearing of the appeal, and that the appellants were entitled to ask for the decision of this House on this appeal.

LORD TREVETHIN (read by LORD SHAW OF DUNFERMLINE). My Lords, the only question before the House upon this appeal is whether the award is bad for error in law appearing on the face of the award.

If your Lordships should be of opinion that the award is bad in law upon its face, it should be set aside, for this is not in my view a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own. This deed contains a general submission under which disputes as well of fact as of law might arise, it raises no specific question of law, and it reserves the supervision and control of the Courts of law by incorporating the Arbitration Act, 1889.

The question, then, is, is this award bad upon the face of it?

It is suggested that the arbitrator has improperly applied certain evidence that was tendered merely to show that it was a case in which the company had sustained damage, by using it for the construction of the Deed of Cancellation itself, although when it was tendered that purpose was expressly disclaimed. It is said that the passage in the award in which he refers to "the circumstances attending the preliminary negotiations and the conclusion of the agreement," shows that he did this, and so went wrong in the construction of the

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Deed of Cancellation, both as to the making of the road and the construction of the railway.

I agree with the Master of the Rolls in thinking that this passage in the award and the expression as to "failure of consideration" is not attractively worded, but I see no ground for imputing to the arbitrator a violation of the well-known principle that you cannot vary or add to a deed by parol evidence.

The learned counsel for the appellants called your Lordships' attention to a number of cases illustrating and applying this principle, but they did not show that the arbitrator had violated it.

I am not aware to what evidence they allude when they say that he did. It appears to me that the award duly construes the Deed of Cancellation, and that the arbitrator was entitled to take into consideration all the surrounding circumstances of the contract for the purpose of ascertaining the meaning of the language contained therein.

Under that deed the company were surrendering their rights and privileges over a very large area of land containing some hundreds of thousands of acres. They were to receive in return a sum of money and the right to select and hold in perpetuity at a rent 50,000 acres in blocks of not less than 2000 acres each, which blocks were to "conform" as to shape and frontage upon road, river or railway and otherwise to "the reasonable requirements of the Government." This selection therefore required the concurrence of both parties to the deed. It was to be made within twelve calendar months after the Government should have delivered to the company a plan showing the line of route of a railway intended to be made by the Government through the concession or part thereof. This plan was to be delivered as soon as the general line of route had been settled, the Government reserving the right to make deviations. The company were by the deed under terms limiting the time for the cultivation of the blocks (clause 4).

It would appear that at the date of the deed it was in contemplation that the route of the railway would run north

and south more or less in the centre of the concession and on the west of the river which bounded the concession on the east: see map No. 2 and deed, clause 8. The plan provided for by clause 4 of the deed was not in fact delivered until October 31, 1918. It showed a railway route which traversed the concession from west to east, crossed the river above mentioned and passed northwards on the east of the river and outside the concession.

During this long delay of more than six years, the selection of the blocks of land above mentioned was made by the parties. Three areas were agreed—one on the south of the concession, one on the west of the concession and one near the centre of the concession; these were all to be traversed by the railway, as finally determined, but the main batch of blocks containing 17,000 acres had been selected to the north of Kuala Tui with a frontage on the river. The railway on this part of its route is to proceed northward upon the east of the river and outside the concession. This 17,000 acres north of Kuala Tui is evidently an important part of the company's estates, for by clause 5 of the deed the Government grants to the company certain lands then occupied at Kuala Tui, including the site of its sawmills and other lands near by between the two rivers Galas and Lebir. The shape, too, of this block of 17,000 acres suggests that it has been the subject of careful selection. When one turns to clause 18, under which the Government undertook within four years to make a cart road within the concession from a point up stream of Kuala Tui, that is, to the south of Kuala Tui, "to the railway referred to in Clause 4," it necessarily undertook to make this cart road to the northward of Kuala Tui, because the deed provided that "for the purposes of such road" the company were to surrender a strip of land one chain wide free from any right, title or interest under the deed or any grant, lease or licence made thereunder.

Now, inasmuch as the company's selected land only extended to just south of Kuala Tui, where the road was to commence, they could only surrender the strip for the road thence to the northward of Kuala Tui. When therefore the

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Government engineers decided to make the railway here about to the east of the river bounding the concession, they must have contemplated some such loop into the concession as is suggested by the dotted line on the north of the plan No. 1, in order to comply with the provisions of clause 18, for you cannot make a road "within the Concession" with a terminus to a railway which does not exist.

I think therefore that the findings of the learned arbitrator are well founded upon the terms of the Deed of Cancellation itself. They are a necessary implication from the acts of the parties done in pursuance of the deed and the language of the express covenant contained in clause 18.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 22, 1923.

Solicitors for the appellants: *Burchells.*
Solicitors for the respondents: *Drake, Son & Parton.*

[PRIVY COUNCIL.]

J. C.* 1922 — *Dec.* 12.

CHIA KHWEE ENG . . . . . APPELLANT;

AND

CHIA POH CHOON AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SINGAPORE).

Will—Construction—Gift to Wife—Gift over on Remarriage—Death of Wife—Chinese Testator—English Will.

A Chinese testator by his will directed that the income of the trust fund thereby constituted should be divided equally between his wife and his three sons, but that if she remarried her one-fourth share should be divided equally among the three sons; and, by clause 17, that upon the expiration of twelve years from his death the corpus should be divided equally between the wife and the three sons, with the same

* *Present:* LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD CARSON.

gift over in the event of her remarrying within that period. The will contained no disposition of the wife's share in the event of her death, which occurred before the testator died:—

Held, that there could not be implied a gift over to the sons upon the wife's death, since there was nothing in the will to show that that was the testator's intention; on the contrary, the presumed intention upon which in other cases a similar implication had been made, namely that the gift was to be limited by the lifetime of the donee, was excluded by clause 17.

Browne v. *Hammond* (1858) John. 210 and *In re Seaton* [1913] 2 Ch. 614 distinguished.

The will being in the English language, and employing English terms of legal art, any consideration of Chinese usages not supported by its express terms was excluded.

Judgment of Supreme Court affirmed.

APPEAL (No. 106 of 1921) from a judgment and decree of the Supreme Court of the Straits Settlements, Singapore (September 15, 1920), affirming a judgment of Bucknill C.J.

The question raised in the appeal was whether upon the true construction of the will of Chia Ong Tin, a Chinese resident in Singapore, the one-fourth share of the trust fund thereby given to his wife, who predeceased him, was or was not well disposed of by the will.

The material terms of the will, which was in the English language and form, appear in the judgment of the Judicial Committee.

Upon an originating summons taken out by the executor, the present first respondent, against the testator's three sons, the present appellant and the other respondents, it was held by Bucknill C.J. that the share of the testator's wife in the trust fund under the will lapsed by her death in the testator's lifetime, and passed to the testator's next of kin. That decision was affirmed upon appeal by a majority of the Court (Sproule and Voules JJ., Barrett-Lennard J. dissenting).

Oct. 30. *Luxmoore K.C.* and *Crossfield* for the appellant referred to *Underhill* v. *Roden* (1) and *Meeds* v. *Wood* (2) in addition to the cases referred to in the judgment.

Gavin Simonds for the respondents.

(1) (1876) 2 Ch. D. 494. (2) (1854) 19 Beav. 215.

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Dec. 12. The judgment of their Lordships was delivered by

LORD SUMNER. When the testator died in 1918 he left a will, the scheme of which was as follows.

After sundry specific bequests to provide for his own and his wife's funeral; for jewellery for his wife and for one of his daughters, and for the marriage expenses of this daughter; for pecuniary legacies to two daughters, two nieces and his sister; and for other sums to remoter legatees; and after making provision for the religious rites and ceremonies called in Chinese "Sin Choo Kee Sin," in memory of himself and his ancestors, he constituted a trust fund, the income of which was disposed of by clause 16 as follows: "My trustees shall divide the income derived from my trust fund among my said wife Tan Lye Neo and my said sons Chia Kwee Eng, Chia Poh Choon and Chia Poh Hock in equal shares (but should my wife marry again, I direct that her one-fourth share in the income aforesaid shall immediately cease and be then equally divided among my said three sons)," and the corpus by clause 17 as follows: "My trustees shall, immediately on the expiration of twelve years after my death, divide my trust fund among my wife and children aforesaid in equal shares (provided that should my wife marry again before the period of distribution of my trust fund I direct that her share in my trust fund shall be given to my said sons in equal shares)."

The will was in English. It employed English terms of legal art, and it is admittedly to be construed according to the English law of wills, as laid down in English decisions. The testator named his wife as one of the executors of this will, but she predeceased him. Three sons and two daughters survived him.

In the event which happened, the share of the corpus destined to the wife by clause 17 was not expressly disposed of. She did not live to take her share, and, so far as it is given over in express words, they are: "Provided that should my wife marry again before the period of distribution of my trust fund, I direct that her share in my trust fund shall be given over to my sons in equal shares."

The wife did not marry again but died, and as it stands the express gift over does not operate. Apart from authority there would be an intestacy. If so, the respondents take as two of the next of kin and this appeal fails.

The appellant's case is that, truly construed, this gift over to the sons takes effect in the event which happened, and not merely in the event actually expressed. They contend that the gift over must be read as a gift over to them " should my wife marry again or die." The principle which they seek to apply is that stated by Parker J. in *In re Seaton* (1) as follows : " Where there is a terminable life interest, and there is a gift over on the happening of an event which does not take place, the Court will read this as a limitation in remainder on the life interest which has determined by death."

The contention is that, as the testator meant his wife's interest to be a life interest only, he could not be supposed to have intended that if she did not remarry and thereby bring the very words of the gift over into operation, she might in that event take an interest absolute.

The principle is an old one ; it is not confined to dispositions in favour of wives, or to the determination by remarriage of the interest given by the will, but it does depend on the possibility of ascertaining from other parts of the will that the original intention of the testator in making the gift was to give a limited interest only. The gift over, as Wood V.-C. says in *Browne* v. *Hammond* (2), " is to be extended by implication," that is, beyond its actual expression, but implication must be an implication from something else ; otherwise this extension would be mere conjecture, and that something else is the testator's intention to be found elsewhere " interwoven into the original gift," as Mr. Jarman puts it (6th ed., ii., 1362).

It appears to their Lordships that clause 17 of the will is decisive against this argument. It provides that, after a certain number of years, during which income only is to be payable to her, the wife is to receive a share of the corpus absolutely. This negatives any presumed intention that she should never have more than a life interest, for it excludes

(1) [1913] 2 Ch. 614, 618. (2) John. 210, 214.

J. C. 1922 CHIA KHWEE ENG v. CHIA POH CHOON.

that general intention from which any extension of the gift over to cover the event of her death is to be implied. Their Lordships are, therefore, of opinion that the son's argument and appeal fail.

Some considerations were advanced in the dissentient judgment of Barrett-Lennard J. which rest on the normal dispositions in favour of sons and to the disadvantage of daughters, which might be expected in a Chinese testator's will. The learned judge thought that in these considerations something might be found, which would show an original intention with regard to the gift to the wife to limit it in such a way as to warrant the suggested implication of an operation of the gift over in the event of the wife's death. How this might be, if the will had not been expressed in English form, it is not necessary to decide. It seems clear that it is deliberately couched in so English a form as to exclude any consideration of Chinese usages not supported by its express terms.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *W. Webb-Ware.*

Solicitors for first respondent: *Nisbet Drew & Loughborough.*

[PRIVY COUNCIL.

SIM E BAK AND ANOTHER . . . . . APPELLANTS; J. C.* 1923

AND

ANG YONG HUAT . . . . . RESPONDENT. *Feb.* 19.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

Tidal Water—Public navigable River—Question of Fact—Artificial Access of Tide.

The flowing of the tide is strong prima facie evidence of the existence of a public navigable river, but whether particular water is or is not of that character depends upon the situation and nature of the channel. Not every ditch or cutting forms part of the public navigable river, even though it is large enough to admit of the passage of a boat. The question is one of degree, and is for the jury, having regard to all the facts. Observations of Lord Mansfield in *Mayor of Lynn* v. *Turner* (1774) 1 Cowp. 86 and of Bayley J. in *Rex* v. *Montague* (1825) 4 B. & C. 598, 601 approved.

A tidal creek was formed by the water of a tidal river filling excavations made owing to clay having been dug from land adjoining the river and formerly dry; it was used by boats in connection with working the clay, but there was no evidence that it was used by the public as a waterway, nor was it likely to be so used:—

Held, that the creek was not part of a public navigable river.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 115 of 1921) from a judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore) dated December 10, 1919, reversing a judgment of the Supreme Court.

The action was brought by the respondent against the appellants, the questions involved in the appeal were whether the water on certain land at Kalang belonging to the respondent formed part of a public navigable river, and whether the appellants were entitled to the free flow of water from the respondent's land over their adjoining land, or to the uninterrupted access of fish and prawns from the respondent's water to their water.

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD WRENBURY.

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The material facts appear from the judgment of the Judicial Committee.

The law in the Straits Settlements with regard to the rights in dispute was the same as the law in England, save that in the Straits Settlements there is no Ordinance corresponding to the Prescription Act, 1832. No question was raised under the local Limitations Ordinance.

The trial judge found that the water on the plaintiff-respondent's land was tidal, and was used by boats considerably larger than the ordinary sampans. He held that the appellants had the rights of riparian proprietors on a public navigable river, and that the respondent by putting up a fence had interfered with the appellants' right to the natural flow of the water. He dismissed the respondent's claim and granted an injunction as counter-claimed by the appellants.

The Court of Appeal set aside the judgment and granted an injunction restraining the appellants from trespassing on the land owned by the respondent, and from damaging, removing, or otherwise interfering with his property. The learned judges held, having regard to the artificial nature of the access of the tide and the other facts of the case, that the water could not be regarded as a public navigable river or creek.

1923. Feb. 1, 2. *A. Grant K.C.* and *Heckscher* for the appellants. The water in question was proved to be tidal and navigable, it was therefore prima facie a public navigable river: *Lyon* v. *Fishmongers' Co.* (1); *Carlisle Corporation* v. *Graham* (2); *Miles* v. *Rose.* (3) There was nothing to rebut the presumption of a dedication to the use of the public. The respondent had no right to interfere with the flow of the tidal water. Even if the tide had access by artificial means, that does not affect the rights of the appellants, in the absence of evidence that the respondent took any steps to prevent the water being used for purposes of navigation:

(1) (1876) 1 App. Cas. 662. (2) (1869) L. R. 4 Ex. 361, 367.
(3) (1814) 5 Taunt. 705.

Sutcliffe v. *Booth*. (1) [Reference was made to *Reg.* v. *Betts*. (2)]

[LORD DUNEDIN referred to *Rex* v. *Montague*. (3)]

Clauson K.C. and *C. W. Turner* for the respondent. Thomson's plan, which was made in 1843, and was not before the trial judge, shows clearly that the water came on to the respondent's land after the survey of 1846, and was the result of artificial causes. There is no evidence that it ever formed part of a navigable thoroughfare, or that the boats which used it did not belong to owners of the land.

[They were stopped.]

A. Grant K.C. replied.

Feb. 19. The judgment of their Lordships was delivered by

LORD WRENBURY. In this case an action was brought claiming against the defendants an injunction to restrain them from trespassing upon the plaintiff's land and damaging and removing his property. The defendants counterclaimed to restrain the plaintiff from erecting an obstruction so as to interfere with the free flow of water over and to the defendants' land. The primary judge dismissed the plaintiff's action, and granted an injunction upon the counterclaim. Upon appeal that decision was reversed, and an injunction was granted in favour of the plaintiff. This is the appeal of the defendants from that order.

The plaintiff is the owner of a plot numbered 742 in the plans which are in evidence in this case. The first defendant is the occupier and the second defendant is the owner of an adjacent plot lying to the south of 742. The site of these plots is a short distance to the east of the Kalang River, Singapore. Plan A. one of the exhibits shows a "10-foot reservation," which has evidently been at one time a reservation 10 feet wide, forming a road or way of some kind. It is easily identified through all the plans by its deviations and sharp turns. By reference to this 10-foot reservation, the plaintiff's land and the defendants' land can

(1) (1863) 32 L. J. (Q. B.) 136. (2) (1850) 16 Q. B. 1022.
(3) 4 B. & C. 598.

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be identified in plans which at first sight seem hard to reconcile. The Kalang River must have shifted its bed between 1843 and the present time, a matter which is highly probable in a place which obviously is more like a mango swamp than a public navigable river.

The part of the 10-foot reservation relevant to the present matter runs first from south-west to north-east to a point marked A on this plan. It then turns almost at a right angle and runs to the east with a little south. Then it turns again almost at a right angle and runs to the north with a little east. The scene of the dispute is immediately to the east of the point A, and just to the north of the " 10-foot reservation."

The earliest information before their Lordships as to the two sites in question is obtained from Thomson's plan of 1843. The 10-foot reservation is found there marked by a thick line. There is upon that plan no trace of the land being in 1843 covered with water or of the existence of the bridge presently mentioned. The evidence shows that there is brick clay in the land in this neighbourhood, and that the owners of plots have from time to time dug out the clay, leaving large and deep holes. And there has come into existence at a date which is not known but is more than twenty or thirty years ago a bridge through which the water of the Kalang River (which runs from north to south at a short distance to the west) has been admitted, and this has filled the holes or basins made by excavation of the brick clay, so that plot 742 and many adjacent plots have become ponds or lagoons, and the 10-foot reservation is now as the tide flows covered with water. The Kalang River is a tidal river, and the result of that which is above described is that the tide now rises and falls in plot 742 and over some substantial part of the adjacent land, and forms what may be called a creek of the sea. The second defendant's land lies to the south of that which has been called the creek. He also has excavated the brick earth on his land, and there has resulted a pond on his land. He has recently cut through the bank at the north-west corner of his land so that the tidal water has obtained access to his land. He is a fisherman

and his purpose was to allow prawns and fish to come up with the tide over his land and be there intercepted by a sluice, by which he confined the outflow when the tide began to fall.

In this state of facts the plaintiff erected in the water on the soil of his land to the north of and extending to the west of the defendants' sluice a fence of posts and planks the result of which was that the prawns and fish were intercepted by the fence and could not get into the defendants' pond. The plaintiff no doubt wanted to take them himself. The first defendant pulled down this fence. The question is as to the respective rights of the plaintiff and of the defendants in this state of facts.

The learned judge of first instance was of opinion that the creek formed part of a tidal navigable river. That it is tidal in the sense that the water in all the ponds or excavations which formed the creek rises and falls with the tide there is no doubt. That it is navigable in the sense that boats within limits of size could and did pass through the bridge and up the waterway and could and did bring away brick, earth or bricks burnt in kilns which have been erected there there is also no doubt. But from those facts it does not follow that the creek is a tidal navigable river. The question is one of degree, to be determined by reference to all the facts. "The flowing and re-flowing of the tide does not make it so," i.e., a navigable river; "for there are many places into which the tide flows which are not navigable rivers; and the place in question may be a creek in their own private estate": per Lord Mansfield in *Mayor of Lynn* v. *Turner*. (1) An instance of this might be a boathouse or boat harbour which an owner might create on his own land. "It does not necessarily follow, because the tide flows and re-flows in any particular place, that it is therefore a public navigation although of sufficient size": per Bayley J., in *Rex* v. *Montague*. (2) The flowing of the tide is strong prima facie evidence of the existence of a public navigable river, but whether it is one or not depends upon the situation and nature of the channel. Not every ditch or cutting which is reached by the tide forms part of

(1) 1 Cowp. 86. (2) 4 B. & C. 598 601.

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the public navigable river, even though it be large enough to admit of the passage of a boat. The question is one of degree, and is for the jury, having regard to all the facts.

The evidence as to user is that "boats come in and go out over 100 times a month," say, four a day. There is no evidence at all that these are not boats used by the owners of the plots to bring out their bricks—and presumably they are. There is absolutely nothing to induce any member of the public to take a boat up this creek, and there is no evidence that any member of the public ever did so. On the other hand, it is the convenient and obvious way of bringing out the bricks.

The case, therefore, stands thus: There is evidence of the creation of the waterway by the excavation of the brick earth. There is nothing beyond the fact that the tide rises and falls in this creek to show that it is a public navigable river. There is no evidence of public user, and the facts are such as to negative any probability of public use.

The fence was erected by the plaintiff on his own land. The defendants, in removing it, were guilty of trespass, unless they could justify their act by establishing that the place where the fence was erected was part of the bed of a public navigable river, and that a right of the defendants was affected by its creation. In their Lordships' opinion they fail in establishing this proposition. They agree with the judgments under appeal, and will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Mayo, Elder & Co.*
Solicitors for respondent: *E. F. Turner & Sons.*

[PRIVY COUNCIL.]

FULLER'S THEATRE AND VAUDEVILLE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ROFE . . . . . RESPONDENT.

J. C.* 1923 Feb. 19.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Landlord and Tenant—Covenant—Not to sublet without Consent—Lessor not to object if his Lessor did not—Failure to disclose Terms—Forfeiture—Waiver.

The respondent held premises under a lease containing covenants by him not to sublet any part without consent, and restricting the purposes for which the premises could be used, with a proviso for re-entry upon a breach. He sublet, with consent, part of the premises to the appellants, who covenanted similarly as to user, and not to sublet without the consent of the respondent and his lessor, the respondent agreeing that he would not object to a subletting if his lessor did not do so. The appellants obtained the respondent's lessor's consent to a proposed subletting subject to the observance of the covenants in the head lease, and thereupon applied for the respondent's consent, but declined to disclose the terms of the proposed sublease. The appellants having executed the sublease without the respondent's consent he sued them for a forfeiture under a proviso for re-entry in his lease to them:—

Held, that the appellants had broken their covenant, and that the respondent was entitled to re-enter.

Held, further (approving *Matthews* v. *Smallwood* [1910] 1 Ch. 777), that to establish waiver of a right of re-entry, the onus is on the lessee to adduce some evidence of the lessor's knowledge of the relevant facts, and proof of a recognition of the tenancy does not throw the onus of proving absence of knowledge on the lessor.

Judgment of the Supreme Court affirmed.

APPEAL (No. 70 of 1922) from a judgment of the Supreme Court of New South Wales (April 13, 1922) affirming the judgment of the Chief Judge in Equity (December 21, 1921).

The respondent sued the appellants in the Supreme Court of New South Wales, alleging that they had committed a breach of a covenant not to sublet without his consent, contained in a lease from him of premises in the city of Sydney, dated November 11, 1918, and claiming to re-enter upon the premises under a proviso in the lease.

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD WRENBURY.

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The facts are fully stated in the judgment of the Judicial Committee.

The Chief Judge in Equity (Street J.) gave judgment for the plaintiff-respondent, and that judgment was affirmed by Full Court consisting of Sir William Cullen C.J. and Gordon and Harvey JJ.

1923. Jan. 30; Feb. 1. *Sir Leslie Scott K.C.*, *Owen Dixon K.C.* and *Pritt* for the appellants.

Sir Ernest Pollock K.C. and *W. A. Barton* for the respondent.

The appellants' counsel referred to *Eastern Telegraph Co.* v. *Dent* (1), *Young* v. *Ashley Gardens Properties* (2), *Lewis & Allenby* v. *Pegge* (3), and *Treloar* v. *Bigge* (4); also, on the question of waiver, to *Rex* v. *Paulson* (5), and *Matthews* v. *Smallwood*. (6) The respondent's counsel were called on only as to the facts relevant to the alleged waiver.

Feb. 19. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from the judgment of the Full Court of the Supreme Court of New South Wales, dated April 13, 1922, affirming a judgment dated December 21, 1921, of Street J., Chief Judge in Equity, in favour of the present respondent.

The proceeding out of which the appeal arises was an action of ejectment brought by Thomas Ernest Rofe, the respondent, against the appellant company, to recover possession of certain valuable premises situate in Sydney, New South Wales, on the ground that the leases under which the appellant company held them from the former had been forfeited by breach by the lessees of their covenant against subletting any portion of the premises demised in it.

The property involved consisted of two "sites," as they were styled, adjoining one another in the city of Sydney. On one of these sites the Grand Opera House had been built. It was styled the "theatre site." On the other, buildings

(1) [1899] 1 Q. B. 835.
(2) [1903] 2 Ch. 112.
(3) [1914] 1 Ch. 782.
(4) (1874) L. R. 9 Ex. 151.
(5) [1921] 1 A. C. 271.
(6) [1910] 1 Ch. 777.

known as the Grand Opera House Chambers had been erected. This site with the buildings thereon was styled the "adjoining premises." By a lease dated December 23, 1910, these two sites, with the buildings respectively upon them, were demised by the Municipal Council of Sydney, hereafter styled the Council, to the present respondent, Thomas Ernest Rofe, for a term of fifty years from October 4, 1910, at the yearly rent of 1200*l*. This lease contained many most onerous covenants, to some of which it is necessary to refer, coupled with a proviso for re-entry on breach by the lessee of any of them. In addition to a covenant to pay the rent reserved, to repair, paint and cleanse the premises, it contained two covenants on which much in this case turns. First, a covenant (a breach of which it was specifically provided could not be remedied) that the lessee would not assign or sublet the whole or any part of the demised premises without the consent of the Council, in writing, first obtained; and secondly, a covenant as to the uses to which the premises must not be put by the lessee. It ran as follows: "He, the lessee, will not use or permit the buildings and demised premises to be used for any purpose other than one of the purposes hereinbefore mentioned. And will not carry on or suffer or permit to be carried on in or upon the demised premises any noxious trade or business whatsoever nor permit or suffer the demised premises or the buildings thereon to be used for any offensive, dangerous or noisy pursuit or operation, or any purpose which shall be in any way a nuisance, danger, damage or annoyance to the owners or tenants of adjoining property or the neighbourhood or to be occupied or frequented by any person of openly immoral conduct."

Having regard to these onerous covenants and conditions it was obviously of vital interest and importance to Mr. Rofe that in case the demised premises or any part of them should be sublet the sublessee should be firmly bound to perform all the covenants by the lessee contained in this head lease, since the breach of any one of them might, at the will of the Council, work a forfeiture of the head lease. And this would

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be all the more necessary since it is well established that no privity of contract or estate would exist between the lessor, the Council, and such a sublessee.

The respondent being thus entitled as lessee to both the so-called sites with the buildings thereon, by deed dated April 4, 1911, sub-demised the "theatre site" with its buildings to one Joseph Lewis Marks, and a duly incorporated company named George Marlow, Ld., for a term of twenty-five years from April 4 aforesaid, at a yearly rent of 3640*l.* for the first twenty years, to be increased to 4160*l.* per annum during the last five years of the term.

Into this lease the oppressive covenants and conditions by the lessee contained in the head lease to Rofe (including those against subletting) were introduced, and his interest thus protected.

The present respondent, in addition, by deed dated December 15, 1915, made to Marks and one Benjamin John Fuller, described as the theatrical manager of the aforesaid company, George Marlow, Ltd., a reversionary lease of the "theatre site" and the buildings thereon for a term of ten years to commence from the expiration of the before-mentioned lease, dated April 4, 1911. This reversionary lease contained a covenant by the lessor identical with that upon which, as regards the lease of the "adjoining premises," the main controversy in this appeal turns. That covenant, relating to assignments or sublettings, is set out hereinafter.

Whether it was because the lease containing this provision was a reversionary lease, or for some other reason which he deemed adequate, Sir Leslie Scott frankly admitted that as to the dealings with the "theatre site" he could not assail the decision appealed against. That matter may consequently be put aside, and the dealings of these parties with the other of the two sites alone considered.

The present respondent, by deed bearing date November 11, 1918, demised direct to the appellants the so-called "adjoining premises" for a term of thirty-five years to run from April 4, 1911, at a rent, payable in advance, of 426*l.*, until December 31, 1918, when it should be increased to 1185*l.* 2*s.*, payable in

advance by equal weekly payments of 22*l.* 16*s.* The lease contained, first, a covenant by the lessees that they would not (with an immaterial exception) assign or sublet the whole or any part of the demised premises without the consent in writing of the lessor (the respondent) and the Council first had and obtained; and secondly a most proper covenant essential for the protection of the lessor's interests, which provided that the lessees: "Will not use or permit the buildings and demised premises to be for any purpose other than one of the purposes mentioned in the said lease of December 23, 1910. And will not carry on or suffer any noxious trade or business . . . . " continuing as in that lease.

But at the end of the lease is found the covenant of the lessor (the respondent) upon which the appellants strongly rely. It runs thus: "The said T. E. Rofe hereby covenants for himself, his executors, administrators and assigns, that so long as the City Council of Sydney raises no objection to an assignment or assignments or subletting or sublettings of the said demised premises or any part thereof the said Lessor will not object to any such assignment or subletting."

The appellants insist that so long as the Council raise no objection to a sublease of the whole or any part of the demised premises, no matter what provisions it contains or does not contain, no matter what opportunity it may afford to the sublessee by a violation of one of the covenants to prejudice the respondent's interest, he (the respondent) is bound to consent to the subletting.

It is well established by the following authorities, amongst others, namely, *Treloar* v. *Bigge* (1); *Sear* v. *House Property and Investment Society* (2); *Barrow* v. *Isaacs & Son* (3); *Eastern Telegraph Co.* v. *Dent* (4), that if one finds in a lease a covenant by the lessee not to assign or sublet the demised premises without the consent, in writing, of the lessor first had and obtained, and also a covenant by the lessor that he will not unreasonably withhold his consent to a subletting or such like, the two covenants must be construed together,

(1) L. R. 9 Ex. 151.
(2) (1880) 16 Ch. D. 387.
(3) [1891] 1 Q. B. 417.
(4) [1899] 1 Q. B. 835.

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with the result that the covenant of the lessee will be held to be qualified by that of the lessor.

If that principle be applied to the present case it may well be that the lessee's positive covenant not to sublet without consent is qualified by the lessor's covenant not to object to or to withhold his consent to a subletting simply because it is a subletting. This is the vice the lessor undertakes to pardon, but it by no means follows that the lessor is disentitled to withhold his consent to the granting of a sublease not because it simply amounts to a subletting, but because of the nature of the provisions it contains. The lessor is, in their Lordships' view, entitled to be told what is in substance the true nature of the transaction to which he is asked to assent. If the provisions of the sublease are reasonable and proper then the lessor could not refuse to give his consent simply because it was a sublease. That fault must be pardoned, but it is an entirely different proposition that the lessor must not only overlook this fault but every other, and approve no matter how much the sublease offends in other respects.

For instance the respondent might have his own lease forfeited if he permitted or suffered any of the noxious trades mentioned in it to be carried on in the premises. It is a vital question whether in such a case the lessor would not be held to have permitted and suffered this to be done when he consented to a sublease which left the sublessee absolutely free to do any of the prohibited things.

The construction of this covenant by the respondent contended for by the appellants, that once the Council consent to the grant of a sublease he, the lessor, is obliged also to consent to the making of it, though he should know nothing of its contents, is in their Lordships' view having regard to the subject matter to which the consents applied an unreasonable and unsound construction to put upon it. They decline to adopt it. The appellants desired to make a sublease of the ground and first floor of the buildings of the adjoining premises to three persons named respectively A. G. L. Biden, F. S. Roberts, and N. F. Biden. The solicitors of the

appellants, Messrs. Sly and Russell, on May 19, 1921, wrote to the respondent Rofe asking for his consent to this subletting. They informed him that the term of the sublease was to be ten years, and the rent 50*l.* per week, the landlord paying the rates and taxes. They gave him no further information as to the contents of the lease, nothing as to its date, the time from which the term was to run or the use to which the demised premises were to be put. They stated that their clients had obtained the consent of the Council, but gave no indication whether this consent was absolute or conditional or was a mere bald consent or a qualified consent, and then informed the respondent that when the lease was executed (i.e. when the matter was fixed and concluded and could not be altered) their clients, i.e. the appellants, would give further particulars of the lease. If the fair construction of this letter be that the Council gave an unconditioned and unqualified consent to the sublease, it is inaccurate and misleading. The consent, which was dated May 19, 1921, was expressed to be to the granting of a sublease to the proposed sublessees, described as "motor cycle specialists," of the ground floor and first floor for ten years from May 28, 1921, "Subject nevertheless to the payment of the rent and the performance and observance of the covenants and conditions in the said Memorandum of Lease reserved and contained and on the Lessee's part to be paid performed and observed and reserving to the Council its rights and remedies in respect of any default already made by the Lessee in the due fulfilment of the said covenants and conditions or any of them." Sir Leslie Scott contended that the words "memorandum of lease" refer to the lease under which the respondent held, and not to the draft sublease. If so, it is a strange misdescription of a deed duly executed long before.

On May 24, 1921, the respondent's solicitor wrote to Messrs. Sly and Russell, asking for a copy of the lease about to be made by Fuller to Biden and Roberts, before advising his client to consent to it. On July 8, 1921, the respondent himself wrote to the secretary of the appellant company, stating that he insisted on the form of lease the appellants

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proposed to execute being submitted for his approval before the same was signed or the terms finally arranged by the company, and asking that the draft might be submitted to him. On July 12 Messrs. Sly and Russell wrote in reply to this reasonable and businesslike request, stating their view, that so long as the approval of the Council was obtained to the sublease from their clients, his (Rofe's) consent was unnecessary, and adding: "It seems to us that going through the form of submitting a draft lease to you which you have no right, either to approve or disapprove of, would be a useless expense."

If it is upon the contention so put forward by these gentlemen that the appellants have been obliged to take their stand upon the hearing of this appeal, it seems impossible in their Lordships' view to justify it on any just, fair, legal, businesslike or creditable principle. The respondent has not been guilty of any breach of his covenant. He has not refused to give his consent to this sublease. He has not raised any objection to the subletting as such. He has only asked before he gives his consent, what on every principle of law and justice he was entitled to—namely, that information should be afforded to him such as would enable him to ascertain what was the precise nature of the thing he was asked to consent to. That information was rather uncivilly withheld from him.

Ultimately when the lease was executed and was no longer held as an escrow but delivered, the sublessees put into possession, and things had become fixed, and Messrs. Sly and Russell evidently thought it could not have been in any way altered or undone, they wrote a letter to the respondent dated July 27, 1921, saying: "Herewith copy lease that has been executed herein, and also copy of the enclosed Council's consent."

The appellants, therefore, in their Lordships' view, have broken their covenant. They have made this sublease without the consent of the respondent. He is entitled to avail himself of that breach and under the condition of re-entry to terminate the lease and recover the possession of the

demised premises. On this point their Lordships are clearly of opinion that the appeal fails.

The second point relied upon by the appellants is that the breach of the covenant against subletting, which the respondent seeks to take advantage of, was waived by the receipt of rent, which it is alleged accrued due as the respondent well knew after the breach of covenant had occurred which is the foundation of his action of ejectment. In *Matthews* v. *Smallwood* (1) Parker J. laid down in terms which have often since been approved of, the law upon this question of waiver with his accustomed clearness and accuracy. "Waiver," he said, "of a right of re-entry can only occur where the lessor, with knowledge of the facts upon what his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose."

Upon one of the other points in the case the headnote states the pith of this judgment thus : "The question whether there has been a waiver in such a case is one of law, and the onus is on the lessee to adduce some evidence of the lessor's knowledge, and proof of an act showing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor."

By the receipt of the letter of Messrs. Sly and Russell, dated July 27, 1921, the lessor is first definitely informed that the lease has been executed, and then for the first time receives a copy of it and of the consent of the Council. The respondent swears he only received these documents on the morning of July 28, 1921 ; up to that time he was deliberately kept in the dark as to the particulars of the transaction upon which his right of entry depended.

A rather futile cross-examination of the respondent is referred to, which really strengthens his case, because it shows how ignorant he was as to the exact position which Biden

(1) [1910] 1 Ch. 777, 786.

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and Roberts occupied or the particular rights they had acquired.

The last receipt for rent is dated July 27, the day before the respondent received the draft lease and was informed of its execution. In addition every one of the weekly receipts for rent from June 22, 1921, to July 27, 1921, inclusive, are indorsed with the words: "Without prejudice to the rights of the lessor under the lease." This indorsement could only have been designed to keep alive the lessor's rights and prevent them from being prejudiced by the secret proceedings.

Their Lordships are of opinion that the appeal fails on this point as well as on the other, and they will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *Snow, Fox, Higginson & Thompson.*
Solicitors for respondent: *Buckeridge & Braune.*

[PRIVY COUNCIL.]

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SENG DJIT HIN . . . . . APPELLANT;

AND

NAGURDAS PURSHOTUMDAS AND COMPANY . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

Straits Settlements — Emergency Legislation — Ordinance applying Law of England — Sale of Goods — "Mercantile law" — Civil Law Ordinance No. 111 (*Str. Sett. No. VIII. of* 1909), *s.* 5, *sub-s.* 1.

In an action brought in Singapore in August, 1917, the defendants counterclaimed damages for failure by the plaintiff to deliver sugar sold by him to be shipped and delivered at Bombay. The shipment of the sugar had been prevented by the requisitioning of ships by the British Government.

Civil Law Ordinance No. 111 (Str. Sett. No. VIII. of 1909), s. 5, sub-s. 1, provides that in all questions which arise for decision in the Colony

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* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD WRENBURY.

" with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, unless in any case other provision is, or shall be made, by statute" :—

Held, that the Ordinance made the Defence of the Realm (Amendment) Act No. 2, 1915, and the Courts (Emergency Powers) Act, 1917, applicable to the case, and that the latter Act gave a good defence to the counterclaim whether the requisitioning was under the Defence of the Realm Act, 1914, or under the prerogative power.

Judgment of the Court of Appeal reversed.

APPEAL (No. 6 of 1922) from a judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore) dated September 4, 1920, reversing a judgment of the Supreme Court.

In August, 1917, the appellant sued the respondents in the Supreme Court of the Straits Settlements for the price of goods sold and delivered; the respondents counterclaimed for damages due to the appellant's failure to deliver under a contract dated June 17, 1917, to ship sugar from Java and delivered at Bombay at a c.i.f. price.

The appellant pleaded Civil Ordinance 111 (Str. Sett. No. VIII. of 1909), s. 5, sub-s. 1, as making applicable the Defence of the Realm (Amendment) Act, No. 2, s. 1, sub-s. 2, and the Courts (Emergency Powers) Act, 1917, s. 1, sub-s. 2; he alleged that he had been prevented from delivering by the requisitioning of ships by the British Government, and that the provisions of English statutory law above referred to constituted a defence to the counterclaim.

The trial judge (Woodward J.) dismissed the counterclaim, but his judgment was reversed on appeal by Bucknill C.J. and Barrett-Lennard J., Voules J. dissenting.

1923. Feb. 2, 5. *Stuart Bevan K.C.* and *D. N. Pritt* for the appellant.

MacKinnon K.C. and *S. L. Porter* for the respondents.

Feb. 20. The judgment of their Lordships was delivered by

LORD DUNEDIN. On June 17, 1917, a contract of sale of sugar was entered into between the appellant (seller) and the

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respondents (buyers) by exchange of letters in the following terms :—

"Singapore, June 17, 1917.—We have sold to you to-day 2,100 (two thousand one hundred) tons of new superior white sugar No. 26 at $10·20 (Ten dollars and twenty cents) Singapore currency per Java Government picul c.i.f. Bombay in good condition. Shipment: Shipment of above 2,100 tons from Java Northern ports July, August and September seven hundred tons monthly 1917. Terms: Cash on full documents against payment.—(Sd.) SENG DJIT HIN."

"Singapore, June 17, 1917.—We have purchased to-day from you 2,100 (two thousand one hundred) tons new superior No. 26 white sugar at $10·20 Singapore currency per Java Government picul c.i.f. Bombay in good condition. Shipment: Shipment of above mentioned 2,100 tons should be made from Java ports in the months July, August and September, 1917, each month seven hundred tons. Terms: Cash on delivery of full document relating shipment.—(Sd.) NAGURDAS PURSHOTUMDAS & Co."

None of the sugar was delivered in the three months specified, but in October, 1917, the appellant delivered 265 tons which the respondents accepted without prejudice. In August, 1917, the appellant raised actions against the respondents for other goods sold and delivered to the respondents. This claim was admitted by the respondents and no question arose thereon; but the respondents counterclaimed for short delivery of the sugar. The present appeal has only to do with the validity of the counterclaim. The appellant admits that no delivery under the contract had been made, but pleaded that he was excused on one of two grounds.

First he said that, owing to impossibility of securing tonnage, it had been impossible for him to perform the contract and that such impossibility excused him. The learned trial judge found that there was no such impossibility as in the circumstances of the case would at common law excuse from the performance of the contract. This view was upheld by the Court of Appeal, and the appellant has expressly stated that

he does not rely upon this point before their Lordships sitting on this Board.

The second ground of defence was as follows: By s. 5 of Ordinance VIII. of 1909 of the Straits Settlements, revised in 1920, and to be cited as Ordinance No. 111 (Civil Law) it was provided: "5.—(1.) In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute." Now at the period in question there had been passed in England the Defence of the Realm (Amendment) No. 2 Act, 1915, and the Courts (Emergency Powers) Act, 1917. By s. 2, sub-s. 2, of the former Act it is provided: "(2.) It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference."

By s. 1, sub-s. 2, of the latter Act it is provided: "(2.) Where, upon an application by any party to any contract whatsoever, the Court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property, any term of the contract cannot be enforced without serious hardship, the Court may, after considering the circumstances of the case and the position of the parties to the

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contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the Court may think fit."

And by s. 3 it is provided: "(3.) Where, before or after the passing of this Act, the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order, or restriction of any Government department or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. . . . ."

The appellant averred that all available shipping for carrying sugar from Java to Bombay had been requisitioned by the Admiralty and that the inability to find tonnage was due to such requisition and that on this account he was excused performance. The learned trial judge gave effect to this plea. The Court of Appeal, by a majority, reversed, upon the grounds that the English Acts cited were not made available by the terms of the Civil Law Ordinance above cited. From this judgment appeal has been taken to His Majesty in Council.

The learned judges of the Court of Appeal based their judgments upon the view that the English statutes above cited were no part of the mercantile law which they thought was the law to be administered in terms of s. 5 of the ordinance. Their Lordships are quite unable to agree with this view, which they think fails to appreciate that it is not the "mercantile law" but "the law" which is to be the same as the law which would be administered in England in the like case. The first thing to be settled is: Has a question or issue

arisen in the Colony with respect to—here follow the enumerated departments of law and then come the general words "and with respect to mercantile law generally"? Now the question here to be decided in the Colony is a question as to the law of sale. No one can doubt that the law of sale is part of the mercantile law. If any proof of the use of such words is required it would be found in the title of the Mercantile Law (Amendment) Act, in two statutes of 1856, both of which especially deal with sale. That being settled the section goes on to say not, as the learned judges seem to assume, that "the mercantile law" (though indeed if it were so it would be doubtful if the result would be different) but that "the law" to be administered shall be the same as would be administered in England in the like case at the corresponding period. Now if the same question as to sale had to be decided at the same time in England it is clear beyond all doubt that the above cited statutes of 1915 and 1917 could be pleaded if the facts allowed of their application. That no other provision had been made by Colonial statute all the learned judges agreed, and the contrary has not been urged in this appeal.

As to the facts the learned trial judge found as follows: "Mr. Westerman, in Samarang, has given evidence as to the requisitioning of the ships of the Asiatic and British India Steam Navigation Company by the British Government during the three months in question and I find on the evidence that the performance of the contract was by this requisitioning rendered practically impossible without any default on the part of the plaintiff, who seems to have done his best to deliver the sugar even to the extent of trying to charter a ship from Messrs. Paterson, Simons & Company." With this finding, which is not dissented from by the learned judges of the Court of Appeal, though the view of the majority made it unnecessary to decide the point, their Lordships agree. The learned counsel for the respondents attempted to show that the requisitioning was all done before the date of the contract, but in that he failed.

The last point taken by the respondents was that the

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Defence of the Realm Act, 1915, could not apply, because requisitioning of ships was not effected under the Defence of the Realm Consolidation Act or the Act of 1915 itself, but under the prerogative. Their Lordships consider it unnecessary to consider this question, because they think that the provisions of the Act of 1917 clearly apply and form a sufficient answer, for under s. 1, sub-s. 2, complete power is given to the Court to annul, and a defence to an action is tantamount to an application; and in addition s. 3 applies in terms.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and restore the judgment of the trial judge. The appellant will have his costs throughout.

Solicitors for appellant: *Mayo, Elder & Co.*
Solicitors for respondents: *E. F. Turner & Co.*

[PRIVY COUNCIL.]

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BROOKS-BIDLAKE AND WHITTALL, LIMITED . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND ANOTHER . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (*British Columbia*)—*Legislative Authority—Employment of Chinese and Japanese—Special Timber Licence—Japanese Treaty Act*, 1913 (3 *& 4 Geo.* 5, *c.* 27, *Dom.*)—*Oriental Orders in Council Validation Act*, 1921 (11 *Geo.* 5, *c.* 49, *B.C.*)—*British North America Act*, 1867 (30 *& 31 Vict. c.* 3), *s.* 91 (25.), *s.* 92 (5.), *s.* 109.

The appellants were holders of licences granted in 1912 enabling them to cut timber on certain lands of the Province of British Columbia, and containing a provision that no Chinese or Japanese labour was to be employed in connection therewith. The licences were for a year, but were renewable from year to year if the terms had been complied with. The provision above mentioned was declared to be invalid by the Court of Appeal of the Province in 1920, but the Legislature of the

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Province in 1921 passed an Act (11 Geo. 5, c. 49) declaring that the provision had the force of law, and that a violation of it should be a sufficient ground for cancelling a licence. The appellants, who employed both Chinese and Japanese, sued for a declaration that they were entitled so to do, and that the Act above referred to was beyond the powers of the Provincial Legislature:—

Held, (1.) that the Act was not ultra vires the Provincial Legislature under the British North America Act, 1867, since although by s. 91, head 25, the Dominion Legislature had exclusive legislative authority as to "naturalization and aliens," the functions of regulating the management of the property of a Province, and of determining whether a grantee or licensee of that property should or should not employ persons of a certain race, were assigned by s. 92, head 5, and s. 109 to the Legislature of the Province, and there was nothing in s. 91 conflicting with that view; (2.) that as the appellants had employed, and claimed the right to employ, both Chinese and Japanese, it was not necessary to determine whether the Act was repugnant to an Act of the Dominion Parliament (3 & 4 Geo. 5, c. 27) by which it was declared that a Treaty signed in 1911 between Great Britain and Japan, and dealing (inter alia) with the pursuit of their industries by subjects of Japan, should have the force of law in Canada; (3.) that the condition against the employment of Chinese having been broken the appellants had no right to renewals of the licences.

Union Colliery Co. v. *Bryden* [1899] A. C. 580 distinguished.

Cunningham v. *Tomey Homma* [1903] A. C. 151 followed.

Judgment of the Supreme Court affirmed.

APPEAL (No. 73 of 1922) by special leave from a judgment of the Supreme Court of Canada (February 7, 1922) reversing a judgment of the Supreme Court of British Columbia.

The appellants brought an action against the respondents, the Attorney-General for British Columbia and the Minister of Lands of that Province, for a declaration that they were entitled to employ Chinese and Japanese labour notwithstanding a provision to the contrary in licences to cut timber issued to them by the Minister; for a declaration that a statute of British Columbia—namely, the Oriental Orders in Council Validation Act, 1921 (11 Geo. 5, c. 49), was insufficient in law to validate the said provision and was beyond the powers of the Provincial Legislature; they further claimed an injunction restraining the respondents from interfering with their enjoyment of their timber licences on the ground of their employment of Chinese and Japanese.

The facts of the case appear from the judgment of the Judicial Committee.

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The trial judge (Murphy J.) upon an application for an interlocutory injunction, which was treated as a motion for judgment, gave judgment for the appellants; the learned judge considered that he was bound by the decision of the Court of Appeal of the Province in *Re the Japanese Treaty Act.* (1) He made an order substantially as claimed by the appellants.

By consent the respondents appealed direct to the Supreme Court of Canada, which heard the appeal at the same time as a reference by the Governor-General referring to that Court the question of the validity of the Act of British Columbia above mentioned.

Upon the reference the learned judges by a majority (Davies C.J. and Duff, Anglin, Brodeur, Mignault JJ.; Idington J. dissenting) held that the Act was invalid. The proceedings are reported at 63 Can. S. C. R. 293.

After delivering their opinions on the reference the learned judges gave judgment unanimously allowing the appeal in the present case. Duff and Anglin JJ. held that the validity of the Act was not material since the licences had lapsed and there was no authority to renew them, having regard to the breach of the provision. Mignault J. (with whom Davies C.J. concurred) held that the validity of the Act was not material, because if it was invalid the licences were so also. Idington J. was of opinion that the Act was not ultra vires the Legislature of British Columbia under the British North America Act, 1867; that the Japanese Treaty Act, 1913 (3 & 4 Geo. 5, c. 27, Dom.), did not affect the matter, but that in any case that Act did not refer to Chinese labour, as to which there had been a breach; he also adopted the view of Mignault J. above stated. The appeal is reported at 63 Can. S. C. R. 466.

1922. Dec. 11, 12. 1923. Jan. 24. *Hon. Sir Malcolm Macnaghten K.C.* and *Bischoff* for the appellants. The statute was ultra vires the Legislature of British Columbia, since the subject matter "naturalization and aliens" is placed within the exclusive legislative power of the Dominion

(1) (1920) 29 B. C. R. 136.

by s. 91, head 25, of the British North America Act, 1867. The legislation falls within the decision of the Board in *Union Colliery Co.* v. *Bryden* (1), not within that in *Cunningham* v. *Tomey Homma.* (2) The "pith and substance" of the legislation was its effect as to aliens. Further, the statute is invalid in that it conflicts with the Japanese Treaty Act (3 & 4 Geo. 5, c. 27) passed by the Dominion Legislature. Under that Treaty and Act Japanese subjects in Canada had the right not to be excluded from among those who might be employed in any industry. The view that invalidity of the provision made the licence invalid is erroneous. The provision is severable from the licence and should be treated as expunged.

Sir John Simon K.C. and *Hon. Geoffrey Lawrence* for the respondents. The Act was not ultra vires the Legislature of British Columbia under the British North America Act, 1867. Like the Act considered in *Cunningham* v. *Tomey Homma* (3) it had not necessarily anything to do with "naturalization and aliens." It excluded a Japanese born in Canada as much as a Japanese who was an alien. The subject matter was the management of the public lands of the Province, which is exclusively confided to the Provincial Legislature by s. 92, head 5. The Dominion must exercise its exclusive authority so as not to conflict with proprietary rights within a Province: *Attorney-General for Canada* v. *Attorney-General for Quebec.* (4) If the provision was valid when it was inserted in the licences in 1912, the Treaty Act which came into force in April, 1913, does not affect the matter. Having regard to the Crown Lands Act (B. C.), 1908, s. 57, sub-s. 3 (as amended by the statutes for 1910, c. 28, s. 6), there was no authority to renew the licences upon the failure to observe its provisions. In any case the Treaty Act has no bearing upon the employment of Chinese; the appellants have employed both Chinese and Japanese and claim the right to do so.

Hon. Sir Malcolm Macnaghten K.C. replied.

(1) [1899] A. C. 580.
(2) [1903] A. C. 151.
(3) [1903] A. C. 151, 156.
(4) [1921] 1 A. C. 413.

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Feb. 23. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal by the plaintiffs in the action from a judgment of the Supreme Court of Canada which reversed a judgment of the Supreme Court of British Columbia and dismissed the plaintiffs' action. The substantial question to be determined is whether the appellants are entitled to a renewal of certain licences to cut and carry away timber from lands belonging to the Province of British Columbia.

The appellants and their predecessors in title were for some time the holders of special timber licences granted by the Minister of Lands of British Columbia under the authority of the Land Act of that Province, and enabling them to cut and carry away timber from certain lands belonging to the Province. Each of these licences was granted for a year only; but under s. 57, sub-s. 3 (*a*), of the Crown Lands Act a licence was renewable from year to year if the terms and conditions of the licence had been complied with. Each licence contained a stipulation in the following terms: "N.B.—This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith."

This stipulation was inserted in compliance with Orders of the Lieutenant-Governor in Council dated May 26 and June 18, 1902. The stipulation had not been observed by the appellants, but the licences were nevertheless renewed or treated as renewed on the same terms in every year down to and including the year commencing February 11, 1920.

On November 16, 1920, the Court of Appeal for British Columbia, on a reference by the Lieutenant-Governor in Council, held the above stipulation to be unauthorized and invalid, partly on the ground that it conflicted with s. 91, head 25, of the British North America Act, by which the exclusive right of legislation with reference to "naturalization and aliens" was reserved to the Dominion Parliament, and partly on the ground that it was repugnant to a Dominion statute, the Japanese Treaty Act, 1913, by which it was declared that the Treaty signed on April 3, 1911, between His Majesty the King and the Emperor of Japan, under

which the subjects of the high contracting parties were "in all that related to the pursuit of their industries, callings, professions and educational studies" to be placed in all respects on the same footing as the subjects or citizens of the most-favoured nation, should have the force of law in Canada: see *Re the Japanese Treaty Act*, 1913. (1) Notwithstanding this decision, the licences were renewed to the appellants in February, 1921, for another year on the same terms; and by the Oriental Orders in Council Validation Act of British Columbia, passed in April, 1921, it was declared that the Orders in Council and the stipulation in question were valid, and had the force of law, and that the violation of any such stipulation in any instrument should be sufficient ground for the cancellation of that instrument. It is not easy to understand why it was considered worth while to pass this enactment, for if (as the Court of Appeal had held) the stipulation was void as conflicting with Imperial or Dominion statutes, no Provincial legislation could give it validity. Fortified by this enactment, however, the Minister of Lands, by a letter dated August 24, 1921, called the attention of the appellants to their breach of the stipulation, and threatened to cancel their licences.

On September 3, 1921, the appellants commenced this action in the Supreme Court of British Columbia against the Attorney-General for British Columbia and the Minister of Lands, claiming a declaration that, notwithstanding the above stipulation, they were entitled to employ Chinese and Japanese upon the timber lands, and an injunction restraining the defendants from interfering with the enjoyment by the plaintiffs of their licences. On an interlocutory motion for an injunction in the above terms, Murphy J., holding himself bound by the above-mentioned decision of the Court of Appeal of British Columbia, granted the injunction. The defendants (by consent) appealed against this order directly to the Supreme Court of Canada. While the appeal was pending, the Governor-General in Council referred to the Supreme Court of Canada the general question whether the Oriental Orders in

(1) 29 B. C. R. 136.

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Council Validation Act was in excess of the powers of the Legislature of British Columbia; and the Supreme Court, having before it both the general reference as to the validity of the Act of 1921 and the appeal of the defendants in this action, heard both matters together, and on February 7, 1922, gave successive judgments in both. On the general reference, the Supreme Court, by a majority, answered the question put to them in the affirmative; but the reasons given for this decision varied, and the result was to leave the law in some doubt. The case was heard by a full Court consisting of Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ., and of these three (Davies C.J. and Anglin and Mignault JJ.) held the stipulation void under s. 91 of the British North America Act, and two (Davies C.J. and Duff J.) held it to be invalid as conflicting with the Japanese Treaty Act. Brodeur J., while holding the Provincial statute to be invalid as regards Japanese subjects on account of the Japanese Treaty Act, held it valid as regards Chinese. The remaining judge (Idington J.) held the stipulation to be wholly valid. The Court then proceeded to give judgment on the appeal in this action, and unanimously allowed the appeal and dismissed the action, mainly on the ground that, even though the condition as to not employing Oriental labour was void, it could not be struck out of the licence, and the right to renewal, being founded on an illegal condition, must fail. Thereupon the present appeal was brought.

The points raised for consideration are two—namely: (1.) Was the stipulation against employing Chinese or Japanese in connection with the timber licences valid, or was it wholly or partly void as conflicting with (*a*) the British North America Act or (*b*) the Japanese Treaty Act of the Dominion; and (2.) If the stipulation was void, were the appellants entitled to a renewal of their licences? The threat to cancel the licences as existing on August 24, 1921, is no longer material, as those licences would in any case have expired on February 11, 1922. It is the right to renewal which is now the substantial issue.

Their Lordships will deal first with the contention that the

stipulation in question is void as conflicting with the British North America Act, 1867. It is said that, as s. 91, head 25, of the British North America Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of "naturalization and aliens," the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the Province. Their Lordships are unable to agree with this contention. Sect. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by s. 92, head 5, and s. 109 of the Act to the Legislature of the Province; and there is nothing in s. 91 which conflicts with that view. In *Union Colliery Co.* v. *Bryden* (1) this Board held that a section in a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only—still less to coal mines belonging to the Province—but was in truth devised to prevent Chinamen from earning their living in the Province. On the other hand, in *Cunningham* v. *Tomey Homma* (2), where another statute of British Columbia had denied the franchise to Japanese, the Board held this to be within the powers of the Provincial Legislature, which had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred. And in *Attorney-General for Canada* v. *Attorney-General for Ontario* (3) it was held that the reservation to the Dominion Parliament by s. 91, head 12, of the Act of 1867 of the right to legislate as to "sea coast and inland fisheries" did not prevent a Province in which a fishery was

(1) [1899] A. C. 580. (2) [1903] A. C. 151.
(3) [1898] A. C. 700.

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vested from settling the conditions upon which fishing rights should be granted. To the same effect is *Attorney-General for Canada* v. *Attorney-General for Quebec.* (1) In their Lordships' opinion, the present case falls within the principle of the authorities last cited and not within *Bryden's Case* (2), and accordingly the stipulation in dispute is not void as contrary to s. 91 of the British North America Act.

This conclusion is sufficient to dispose of the present appeal. Each licence is issued upon the understanding that no Chinese or Japanese shall be employed in connection therewith; and the appellants' right to renewal is contingent upon their complying with this stipulation. It appears from the indorsement of the writ in this action, as well as from para. 5 of the affidavit filed by the appellants in support of the motion, that they have employed and claim the right to employ both Chinese and Japanese labour. Now, whatever may be said as to the stipulation against employing Japanese labour, there is nothing (apart from the British North America Act) to show that a stipulation against the employment of Chinese labour is invalid. The stipulation is severable, Chinese and Japanese being separately named; and the condition against employing Chinese labour having been broken, the appellants have no right to renewal. Upon this point their Lordships agree with Brodeur J.

Having regard to the above considerations, the point raised on the Japanese Treaty Act does not arise, and their Lordships think it unnecessary to deal with it. They will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondents: *Gard, Lyell, Betenson & Davidson.*

(1) [1921] 1 A. C. 413.

(2) [1899] A. C. 580.

[PRIVY COUNCIL.]

SNUSHALL . . . . . APPELLANT;

AND

KAIKOURA COUNTY COUNCIL . . . RESPONDENTS.

J. C.*
1923
March 1.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—County Roads—Road laid down in Record Map—Dedication—Cost of removing Obstruction—Right of Action—Joinder of Attorney-General—"Road"—Counties Act, 1908 (*Consol. Stats. No.* 31), *ss.* 145, 153 —*Public Works Act*, 1908 (*Consol. Stats. No.* 160), *s.* 102.

A road laid out upon a public record map pursuant to regulations made in 1856 under a statute of New Zealand, is a "road" within the definition in s. 101 of the Public Works Act, 1908 (N. Z.), whether it has been pegged out on the land or not, and consequently by s. 153 of the Counties Act, 1908 (N. Z.), is under the care and management of the County Council where that Act is in force.

As s. 145 of the Public Works Act, 1908, makes a person who unlawfully erects a fence on a "road" liable to a fine, and to a further sum equal to the cost incurred by the local authority in removing the obstruction, a County Council can sue, without joining the Attorney-General, to recover the cost incurred by it in removing a fence unlawfully erected upon a road under their care and management; the remedy given by statute is different from the general remedy of the public.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 30 of 1922) from a judgment (July 28, 1920) of the Court of Appeal of New Zealand, affirming a judgment (December 15, 1919) of the Supreme Court.

The action was brought by the respondent County Council against the appellant in the Supreme Court of New Zealand for a declaration that certain strips of land, described in the statement of claim as roads, were public roads, also to recover 5*l.* 7*s.* as the expenses incurred by them in removing a fence erected thereon by the appellant. The appellant by his defence admitted that the strips of land referred to were shown on public record maps as roads, but he denied that the respondents had ever taken possession or control of them, or that they had ever been used or formed or were required

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

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as roads; he was willing to pay a reasonable rent for use and occupation.

The main question in the action and upon the appeal was whether the strips of land, which had been laid out as roads upon record maps pursuant to reg. 9 (1.) of regulations made under the Waste Lands Act, 1854 (N. Z.), were "roads" within the definition in s. 101 of the Public Works Act, 1908 (N. Z.), so as to be county roads under the care and management of the respondents by s. 153 of the Counties Act, 1908 (N. Z.).

A further question was raised—namely, whether the respondents could maintain the action without joining the Attorney-General.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The trial judge (Herdman J.) gave judgment for the plaintiffs; and that judgment was affirmed by the Court of Appeal (Sir Robert Stout C.J., and Chapman, Sim and Stringer JJ.). The proceedings are reported at [1920] N. Z. L. R. 783.

1923. Jan. 23, 25, 26, 29, 30. *G. J. Talbot K.C.* and *R. A. Glen* for the appellant. The strips of land in question in the appeal were not "roads" within the meaning of s. 101 of the Public Works Act, 1908, and consequently were not under the care and management of the respondents by s. 153 of the Counties Act, 1908. On the true construction of s. 101 above mentioned, nothing is a "road" which is not a public highway. The Court of Appeal of New Zealand so held in *Kirkwood* v. *Wilson* (1) and *Attorney-General* v. *Miller*. (2) In order to constitute a highway there must be not only a dedication but also acceptance by the public: *Cubitt* v. *Maxse* (3); *Attorney-General* v. *Biphosphated Guano Co.* (4) That principle has been adopted in New Zealand: *Bank of New Zealand* v. *District Land Registrar, Auckland* (5); *Attorney-General* v. *Reid*. (6) There was no user by the public, or anything else

(1) (1908) 27 N. Z. L. R. 1051.
(2) (1906) 26 N. Z. L. R. 348.
(3) (1873) L. R. 8 C. P. 704.
(4) (1879) 11 Ch. D. 327.
(5) (1907) 27 N. Z. L. R. 126.
(6) [1920] N. Z. L. R. 563.

amounting to an acceptance. The cases relied on in the judgments in support of the view that these strips of land were public highways did not so decide. If they did they conflict with the two decisions of the Court of Appeal of New Zealand already cited. The words "laid out" in s. 101 (*a*) of the Public Works Act, 1908, mean physically laid out: *Mackett* v. *Herne Bay Commissioners.* (1) The total area of strips laid out before 1865 in the county is 2000 acres, yet the County Council has over them no power of management save as highways, for which purpose they may never be used or required. Secondly, the respondents could not recover the expenditure in this action. Sect. 145 of the Public Works Act, 1908, imposes penalties for obstruction; the expenses of removing an obstruction are recoverable merely as an addition to the penalties, the right to recover being given by s. 284. The only method which the respondents could pursue to recover the expenses was by summary proceedings under s. 284: *Mayor of Blackburn* v. *Parkinson.* (2) Thirdly, the respondents were not owners or occupiers; their rights were only on behalf of the public. Consequently the action could not be maintained save in the name of the Attorney-General: *Bermondsey Vestry* v. *Brown* (3); *Wallasey Local Board* v. *Gracey* (4); *Tottenham Urban Council* v. *Williamson and Sons* (5); *Tuapeka County Council* v. *Johns.* (6)

Maugham K.C. The roads were "public highways" within s. 101; secondly, each came within the words of s. 101 (*c*), "Crown Lands over which a road is laid out and marked on the record maps"; thirdly, they were lands over which a right of way had also been dedicated to the public within s. 101 (*b*); finally, they were within the concluding words of s. 101, "declared roads under any law." The intention and meaning of the regulations is that the roads marked out shall be public roads. From the time that sales of the lands were effected these roads were dedicated as highways in the sense that any member of the public could

(1) (1877) 37 L. T. 812, 815.
(2) (1858) 28 L. J. (M. C.) 7.
(3) (1865) L. R. 1 Eq. 204.
(4) (1887) 36 Ch. D. 593.
(5) [1896] 2 Q. B. 353.
(6) (1913) 32 N. Z. L. R. 618.

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walk along them. No acceptance was needed by law. In England acceptance of a dedication is not necessary when a road is laid out pursuant to an Act of Parliament: *Cubitt* v. *Maxse*. (1) The Crown grants always referred to these roads as "public roads." If the appellant's construction of s. 101 is right it would have been sufficient to say simply that a "road" meant a "public highway."

Talbot K.C. replied.

March 1. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Court of Appeal of New Zealand, affirming one delivered in the Supreme Court of that Dominion by Herdman J.

The question to be determined is whether certain roads in the county of Kaikoura are public roads under the control of the respondents, and whether the respondents are entitled to recover from the appellant a small sum of money as the expense to which they have been put in removing fencing improperly placed on the roads by the appellant. The latter does not deny that if the roads have been public roads actually laid out on the land or used as roads by the public he was not entitled to interfere with them. His case is that they were never public roads so laid out or used.

The roads in question are strips of land, about a chain in width, which either form the boundaries of or intersect land now belonging to the appellant. The land was formerly the property of the Crown, and was granted to a predecessor in title of the appellant. The particular strips of land have never been in fact fenced off or made up, or actually used as roads by the general public. Strips of this kind are not uncommon in the Dominion and are commonly referred to as "paper roads" or as "subdivisional roads." The strips in controversy contain an area of about seventy acres, and there is said to be a total acreage in the county of Kaikoura of about 2000 of such acres.

In order to understand what these strips are, and how they were determined, it is necessary to refer to the history of the

(1) L. R. 8 C. P. 704.

manner in which the New Zealand Government has dealt with the land under its control, and particularly with the roads which bound or intersect it.

In 1856, to take an example illustrative of the present case, certain regulations, which had statutory authority, were gazetted for the regulation of the sale and disposal of the waste lands of the Crown within the Province of Nelson, within which the land in the now existing county of Kaikoura was situated. Of this land that to which the controversy relates formed part. Apparently three surveys were made of it—in 1865, in 1897 and in 1907. The survey of 1865 was made under the Nelson Land Regulations of 1856. Under these regulations the principal surveyor for the Government within the Province was charged with the duty of notifying that the native title had been extinguished in the land within the district, and of transmitting with the notification an outline map descriptive of the land within the district to the official superintendent. As soon as the notification and map had been received proper surveys were to be made, and the superintendent was to divide the district into counties and hundreds, and from time to time to make reserves for the sites of towns and villages, or for lines of internal communication, by roads and otherwise, for buildings, such as churches, court-houses and prisons, and for other purposes of public utility, convenience or enjoyment. A thirty-second part of this land was to be set apart and reserved as an endowment for education. All these reserves of land were to be notified in the Government Gazette, and all reserves for roads, streets and squares throughout the Province were to be vested in the superintendent under the Public Reserves Act, 1854. Reserves, lines of road and sections were to be laid down on the proper maps of each district, and roads and streets were to be not less, as a rule, than a chain in width. In laying out sections certain rules were to be adhered to as nearly as possible, among them that every section should front a road, that road frontages should not exceed two-thirds of the depth of a section, and that, except in the case of natural boundaries, the sections should be rectilinear. There was

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to be an authentic copy of the map or plan of each district signed by the principal surveyor, together with all reports of the surveyors respecting the same, deposited in the Land Office and open to public inspection.

The appellant's land, which contains about 4831 acres, consists of six sections, comprised in Crown grants made in 1860. On each of these grants there is a plan drawn in the margin, and the parcels granted are described by reference to the marginal plan. The roads adjoining or intersecting the sections comprised in the grants are shown on the marginal plans as enclosed between parallel lines, and are verbally described as "public roads." When, later on, the title to the appellant's land came to be registered under the Land Transfer Act of the Dominion, it was registered in two parts, with separate certificates, each of which again contained a plan showing the roads marked off between parallel lines, and also contains descriptions of the property by reference to the then existing public record maps. These include the surveyor's plan which was made of the area, as well as the Crown grant index record map of the district, and show the roads in question in such a manner that their situation can be sufficiently identified from the map and plan.

To what extent the notification and survey required by the Nelson Land Regulations of 1856 were carried out before the survey by Ward does not clearly appear. It is at all events clear that, in 1866, a map was made by Ward showing the roads (including those in question in these proceedings), and the sections, rivers and other natural features of the ground. It also shows by red dots the position of numerous marks on the ground used in ascertaining the peripheries of the property granted. It appears that Ward was assisted in his work by a son, A. C. T. Ward, who is still alive, although old and blind, and whose evidence was taken on commission. He said that he did not himself survey or peg off any roads, the reason being, in his view, that the road lines were shown on the plans themselves to comply formally with the regulations. He went round the boundaries of the block, taking some observations as to whether it was hilly or flat. He

did enough work to estimate the area. Individual sections were estimated on the plan, but not on the ground, and he considered that such a survey complied with the regulations. During his time the roads on the estate in question, which was known as the Greenhills estate, were never actually laid out as roads. He could not remember whether he himself made the plans or whether his father made them from his survey. The party that made this survey consisted of himself, his brother and another man. He denied that any pegs were put in to mark roads. At a boundary corner they put on the ground a heap of stones, not a peg. He was twenty-one at the time, and was seventy-six when he gave his evidence, and had been blind for nine years. It would have been possible, he considered, for a surveyor to peg off on the ground the paper roads shown on the plan and a Government surveyor might have done it.

Leader, however, who was the county engineer, and also a practical surveyor, says that he was instructed before the present proceedings to locate the roads in question, and that the tracings he had enabled him to find them. Macintyre, another surveyor who had been instructed to inspect the paper roads on the Greenhills estate, says that Leader pointed out to him the pegs he had found, but he could not swear that they had been put in as road pegs.

The evidence on the question whether at the time of Ward's survey any pegs were put or marks made on the ground which could indicate the roads is neither consistent nor satisfactory. Their Lordships would hesitate before coming to the conclusion that it had been proved that the survey made on the ground in Ward's time resulted in pegs having been put in which marked the roads. But in their Lordships' view it is not necessary to treat this as proved before coming to the conclusion that the strips in question are public roads under the respondents' control. For the Public Works Act, to be presently referred to, contains a provision sufficient to make the strips such public roads, along with the solium under them, if a right of way has in any manner been dedicated to the public by any person entitled to make such

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dedication. Their Lordships think that what has taken place is equivalent in point of law to such a dedication. They therefore turn to the reasons which have brought them to this conclusion.

The question has been dealt with by two statutes, passed in 1908 by the Parliament of New Zealand, one being the Public Works Act, and the other being the Counties Act. The latter has since been re-enacted and superseded by the Counties Act of 1920, but as the terms in which it was re-enacted do not differ in any material particulars from those of the statute of 1908, it will be convenient to refer to the two enactments of the earlier year, which applied at the time, as governing the case.

The Public Works Act of 1908 consolidated the similar previous statutes and provided that all public works authorized by them should be deemed to be authorized by the Act of 1908 and continued, completed and enforced under it. Public Works were defined to include surveys and roads, and land required for these might, if it were required for any Government work, be taken by the Government, and, if required for any local work, by the local authority. Compensation was to be paid, and if the land taken turned out not to be wanted it might be sold and the proceeds carried to the fund appropriated to the execution of the works in respect of which the lands had been taken. If land were taken under the Act for a road, the right to make which had been otherwise reserved to the Crown, no compensation was to be payable. Large powers of making surveys were conferred. By s. 101 "road" was defined to mean a public highway, whether carriage-way, bridlepath or footway, and to include the soil of (*a*) Crown lands over which a road had been laid out and marked on the record maps, and (*b*) lands over which a right of way had in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication, and (*d*) the lands over which a road had been or was in use by the public, which had been formed or improved out of the public fund or out of the funds of any former province, or out of the ordinary funds of any local authority, for

the width formed, used, agreed on, or fenced, not being more than fifty links on either side of the middle line thereof, and a sufficient plan whereof, approved by the Chief Surveyor of the land district wherein such land was situate, had been or was thereafter registered by the District Land Registrar or the Registrar of Deeds; (*e*) lands over which any road, notwithstanding any legal or technical informality in the taking or construction thereof, had been taken, constructed or used under the authority of the Government of any former province or of any local authority, and a sufficient plan had been registered in manner provided in the last preceding paragraph. "Road," unless repugnant to the context, was to include all roads which had been or might thereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force. By s. 102 all roads and the soil thereof were declared to be vested in the Crown. By s. 105 all roads in an outlying district were to be deemed to be county roads wherever the Counties Act, 1908, was in force, and by s. 106 all powers, rights, duties and liabilities vested in and imposed on a Road Board in respect of a district road were to be vested in and imposed on the County Council. It is agreed that the roads in controversy, if laid out, were the county roads. By s. 145 any person who (inter alia) unlawfully erects a fence on any road is to be liable to a fine not exceeding 10*l.* for every day of the offence, and to a further sum equal to the cost incurred by the local authority in removing the obstruction.

By the Counties Act of 1908 the inhabitants of every county were made a body corporate, with a Council. By s. 153 the Council was to have the care and management of all county roads within the meaning of the Public Works Act, 1908, with full powers to construct, improve, repair and maintain the same, and might exercise such control over all such roads, although the same were not formed or made. All lines of roads or tracks passing through or over any Crown lands or native land, and generally used without obstruction as roads, were, for the purposes of s. 153, to be deemed to be public roads not exceeding sixty-six feet in width and under

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the control of the Council, notwithstanding that any such lines of roads had not been surveyed, laid off, or dedicated in any special manner to public use.

It is clear that under the Nelson Land Regulations the vital matter is only the laying down on the surveyor's map, as distinguished from the land itself, the reserves for roads. There is no provision in the regulations, analogous to that in s. 101 (*a*) of the Public Works Act of 1908, pointing to the necessity of the road being laid out on the land itself. If the requirements under the regulations were carried out, then the effect of s. 153 of the Counties Act of 1908 is to place the road so constituted under the care and management of the County Council, and that even if the line of the road had not been surveyed, laid off, or dedicated in any more particular or special manner to public use.

As the title to maintain and control the road is under this section given to the County Council, and as s. 145 of the contemporaneous Public Works Act makes any one who, without their written permission, interferes with their control by erecting a fence on the road liable for the cost, within a certain limit, incurred by the County Council in removing the obstruction, their Lordships are of opinion that the respondents were entitled to bring the present action, and that the joinder of the Attorney-General as representing the Crown was not necessary. The effect of the statute is to give to the local authority the remedy which the law attaches to a right for its enforcement, and which is quite different from the general remedy of the public as such. They are also of opinion that it makes no difference to the rights of the respondents, if their purpose is in reality, as alleged, to compel a purchase from the respondents rather than to open up the roads.

The result is that the judgments in the Courts below are, in the view taken by their Lordships, right in their conclusion. For reasons which have already been given, they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Longbourne, Stevens & Powell.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

CHOA ENG WAN AND OTHERS . . . APPELLANTS; J. C.* 1923 April 30.

AND

CHOA GIANG TEE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS, SINGAPORE.

Will—Revoked Clause—Construction of Codicil—Reference to revoked Clause inadmissible.

By a codicil to the will of a Chinese testator, whose testamentary disposition was in English and to be construed according to English law, certain clauses of the will were revoked and the testator directed that at the termination of twenty-one years the proceeds of certain property should be distributed between his sons by a named Chinese wife who survived the testator but had only one son. The will and codicil were admitted to probate. It was contended that the terms of one of the revoked clauses showed that the draftsman understood that two sons of the testator by another Chinese wife, who predeceased the testator, were the sons of the named wife, and that the intention of the testator was that they should share in the distribution:—

Held, that the language of the codicil being unambiguous the revoked clause could not be resorted to.

Judgment of the Supreme Court affirmed.

APPEAL (No. 57 of 1922) from a decree of the Supreme Court of the Straits Settlements, Settlement of Singapore (December 20, 1921), reversing a decree of Barrett-Lennard J.

The appeal related to the testamentary disposition of a testator of Chinese origin who died in 1900 possessed of considerable property in Rangoon and Singapore.

The relevant facts appear from the judgment of the Judicial Committee.

1923. April 12. *Jenkins K.C.* and *K. F. Wood* for the appellants. The words in the codicil "my sons by Choo Bin Lee" are not used in their natural sense. The will, including the revoked clauses, must be looked at to ascertain what is the effect of the codicil. No effect could be given to clause 32 except on the hypothesis that the draftsman thought

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, and LORD PARMOOR.

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that Choo Bin Lee was the mother of all the testator's sons; the words in the codicil must be read in the same way as the same words in the clause. The proposition in *Hughes* v. *Turner* (1), relied on below, is not controverted, but is not applicable to the present case. That case related to the construction of a will, and to a revoked will; different considerations apply to a codicil and a revoked clause of the will to which it is a codicil. There is no previous authority upon the present point.

Upjohn K.C. and *Gavin Simonds* for the respondent were not called upon.

April 30. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The appellants are the grandsons of the testator in the suit. It was brought for the administration of his estate by the respondent, the plaintiff, as a trustee and a beneficiary, against the appellant, Choa Eng Wan, as a trustee under the testator's will, and also as an individual entitled, along with the other appellants, who were also made defendants, to be beneficially a claimant. The testator died in 1900 leaving the will under which the questions raised arise, and a considerable amount of landed and house property in Rangoon and Singapore, in the latter of which he was resident. He was of Chinese origin.

The testator left surviving him Choo Bin Lee, a Chinese wife, and by her one son and two daughters. This son is living and is the respondent. He also left two other sons and a daughter by a Chinese wife who had predeceased him. These sons died before the period of distribution fixed by the will, but the grandson, the appellant Choa Eng Wan, is the son of one of them, and the grandsons, the other two appellants, are the sons of the other. The testator also left a Burmese wife and a son and two daughters by her, and a concubine and a daughter by her, but as to these no question arises.

As has been observed, Choo Bin Lee, the Chinese wife, who survived him, had only one son, the respondent.

(1) (1835) 3 Myl. & K. 666, 697.

The testator made his will in 1897. After making a number of pecuniary bequests, he left a house at Rangoon on trust for his Burmese wife for life and after her death for her son. There was also provision by pecuniary legacies on trust for her son and her daughters. He made bequests of other houses for his daughters and their children after them. The house where he lived at Rangoon he left in trust during a period of twenty-one years, for the benefit of his surviving Chinese wife for life and his sons and their families. At the end of the period of twenty-one years this house was to go into his residuary estate. He then, and subject to these provisions, by clause 28 and subsequent clauses of his will, left all his houses and lands on trust to take the rents and accumulate a fifth part of them, and as to the other four-fifths parts, to divide these into sixths and apply them for the benefit of his sons whom he named and their sons and daughters and the wife and sons of another son for whom he made no provision in his will excepting one that was nominal. By clause 32 he directed that at the termination of this period of twenty-one years the property so given on trust was to be converted into money and the net proceeds divided "into the same number of shares as the number of my sons by the said Choo Bin Lee who shall be then living or shall have died leaving sons then living. I direct that one of the said shares shall be given to each of my sons by the said Choo Bin Lee (other than Choa Giang Wee) then living and to the sons then living of any such other then deceased son of mine by the said Choo Bin Lee, but so that the sons of any such then deceased son shall take equally between them only the share which their parent would have taken had he then been living."

It has been argued before their Lordships that this will, which was drawn up by an English solicitor in Singapore, indicates a serious misapprehension by the draftsman of the testator's family relationships, and it is said that on the face of the will it is evident that the testator must have thought that he was signing a will giving an interest to several of his sons, instead of solely to the respondent, the only son

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of Choo Bin Lee. It is pointed out that the draftsman appears to have thought that Choa Giang Wee, the son who is excluded from benefit, was the son of that wife, instead of, as was the case, the son of the other Chinese wife, who had predeceased the testator. It is said that the testator presumably did not know English sufficiently well to be able to check the descriptions of his beneficiaries in the draft, and that the mistakes in its expressions indicate sufficiently clearly that the testator intended to include all his sons (other than the one excluded by name), whether they were the sons of Choo Bin Lee or not. But their Lordships consider that, even if a plausible argument could be maintained in support of this contention, its basis is swept away by a codicil to his will which the testator executed in 1900. The English solicitor, who prepared both, may have misapprehended his instructions in 1897 when the will was made. But it cannot be presumed that on the second occasion when there was an elaborate revision there was a second misapprehension. In the codicil which he drew up for him in 1900 there is no ambiguity. In this codicil, after modifying and amplifying various provisions made in the original will, the testator says : " I hereby revoke the 28th, 29th, 30th, 31st and 32nd clauses of my said will, and declare that my said will shall be read and construed as if the words in the clauses hereinafter set out and numbered or distinguished as A, B, C, D and E, had been substituted therefor."

By clause E of the codicil the testator directs that at the termination of the period of twenty-one years the net proceeds of the lands and houses and furniture which he has directed to be converted shall be divided " into the same number of shares as is the number at the period appointed for such distribution of my sons by the said Choo Bin Lee who shall then be living or shall have died leaving sons then living. I direct that one of the said shares shall be given to each of my sons by the said Choo Bin Lee then living and to the son then living of any such other deceased son of mine by the said Choo Bin Lee," but only per stirpes.

Their Lordships cannot discover any ambiguity in the

direction just quoted, which is substituted for the revoked clause 32 of the original will. Nor do they think that even if the old clause 32 was shown to have been adopted under a misapprehension it would be admissible to read it in conjunction with the new clause E substituted for it by the codicil as modifying the literal language of the testator in the latter. When a provision in a will has been clearly revoked it has ceased to be indicative by the law of England, which applies here, of the testator's intention. Probate is sometimes granted of a series of documents the later ones of which may alter or revoke the earlier; that is in order that the mutual implications and the sequence of the set of testamentary documents may be complete. But when a provision has once been clearly revoked it cannot, even when admitted to probate, be resorted to as expressing the testator's intention for any purpose. In the codicil before them their Lordships find a complete revocation distinctly made. It was argued that there is an ambiguity in the codicil occasioned by the reference to Choo Bin Lee as the mother of the testator's sons, whereas he had only one by her; but the answer is that he might have been thinking of a possible posthumous son. About the ideas that may have entered his mind their Lordships are not at liberty to speculate. There is no ambiguity in the words he has used. They are quite distinct. It is only by referring back to the language of the original will that any foundation could be laid for suggesting that he did not understand what he was saying when for the second time he made an elaborate disposition of his property among the members of his family. Such a mode of approach is not legitimate. The ambiguity must be apparent on the face of the will before evidence can be resorted to for its explanation, and here there is no mistake or ambiguity excepting that suggested, if it be suggested, by a document which is no longer admissible as evidence of the testator's intention.

Barrett-Lennard J., who tried the case in the Supreme Court at Singapore, thought that he could look at clause 32 of the original will as indicating that the testator used the words "sons by Choo Bin Lee" in an unnatural sense, and

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that this was due to his English solicitor not having understood his instructions if he gave them in Malay or imperfect English. He therefore decided in favour of the appellants. For the reasons they have indicated their Lordships think that this was a wrong decision. The appellate Court at Singapore reversed it for reasons with which their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should accordingly be dismissed, and they think that the dismissal must be with costs.

Solicitors for appellants: *E. F. Turner & Sons.*
Solicitors for respondent: *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

J. C.* 1923 *May* 8.

ANEGE AKUE . . . . . APPELLANT;

AND

KOJO ABABIO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST.

Gold Coast—Expropriation of Lands—Procedure—Appeal from Judgment—Notice of Appeal—Public Lands Ordinance, 1876, *s.* 6, *sub-s.* 8.

Sect. 6, sub-s. 8, of the Public Lands Ordinance, 1876 (Gold Coast), which provides that a party who desires to appeal from a judgment under the section (namely, a judgment as to questions arising out of the acquisition of land under the Ordinance), is to give notice of his "intention to appeal," is complied with if a notice to appeal in accordance with the rules under the Supreme Court Ordinance, 1876, is given to the requisite parties; a notice under s. 6, sub-s. 8, is not necessary in addition to a notice of appeal under the rules. Further, where the amount of the compensation is agreed, and the only issue with which the judgment deals is the competing rights of two claimants to the land, neither the Colonial Secretary nor the other claimants need be served with notice of the appeal as parties affected by it.

Judgment of the Supreme Court reversed.

APPEAL (No. 86 of 1922) by special leave from a judgment of the Supreme Court of the Gold Coast (March 7, 1921) affirming a judgment of the Chief Justice.

* *Present:* VISCOUNT HALDANE, LORD SHAW, and LORD PARMOOR.

The appeal arose out of proceedings under the Public Lands Ordinance, 1876, for the acquisition of land required for the service of the Colony.

The only question arising upon the appeal was whether in the circumstances of the case the present appellant had given proper notice of his intention to appeal to the appellate Court in the Colony from a judgment of the Chief Justice (Sir Philip Smyly) delivered upon the trial of an issue whether the appellant or the respondent was entitled to the lands in question. The Full Court had held that the notices given were insufficient to comply with s. 6, sub-s. 8, of the above Ordinance, and with the order of the Court giving conditional leave to appeal.

The facts of the case and the material provisions of the Ordinance appear from the judgment of the Judicial Committee.

1923. April 19. *Montgomerie K.C.* and *J. A. Johnston* for the appellant.

Clauson K.C. and *Sir W. B. Griffith* for the respondent.

May 8. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal brought by special leave from an order of the Full Court of the Gold Coast Colony. The leave granted extends only to appeal from certain preliminary objections to the hearing of the appeal, on the allowance of which objections the order complained of was based. In the Court of first instance Smyly C.J. had decided in favour of the respondent. The question before him was whether the respondent or the appellant was entitled to certain compensation payable by the Government of the Gold Coast Colony for lands taken compulsorily for waterworks purposes under the Public Lands Ordinance, 1876, of the Colony. On appeal the Full Court refused to enter on the merits, holding that the appeal failed by reason of the appellant not having complied with conditions which under the law of the Colony must be complied with by an appellant before he could become entitled to have his appeal heard.

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The amount of compensation for the land taken was agreed with the Colonial Secretary of the Colony at a certain sum. The question which emerged being who was entitled to this sum came before Smyly C.J. for decision. He tried the question as between the appellant and the respondent, subject to the possible establishment of claims by other persons with minor titles, who, along with the Colonial Secretary, did not intervene at the hearing. The decision was given on July 24, 1918. The appellant, as was required by the procedure rules, applied ex parte for leave to appeal. The application stood over till December 13, 1918, when the appellant was given conditional leave to appeal on terms of paying money into Court and of giving notice to all parties affected by the appeal. The appellant duly paid the money into Court and, on January 7, 1919, gave notice of appeal to the respondent and not to any one else. On January 31, 1919, he was given final leave to appeal.

The appeal came on on March 3, 1921, before Smyly C.J. and Porter and Wilkinson JJ., when the respondent took the following preliminary objections: (1.) that the appellant had not complied with s. 6, sub-s. 8, of the Public Lands Ordinance, 1876, the only notice of appeal given to the respondent not being such as was required by the section; (2.) that notice had not (as required by the Order of December 13, 1918) been given to the parties other than the respondent affected by the appeal.

The Full Court reserved judgment, and on March 7, 1921, dismissed the appeal. All three of the judges who heard the case agreed in holding that the appellant had not complied with s. 6, sub-s. 8, of the Public Lands Ordinance, 1876. Smyly C.J. was of opinion that the respondent's further objection to the appeal, on the second ground, that there were other persons directly affected, was invalid. But Porter and Wilkinson JJ. thought that the second objection also was valid, and held that all the parties on the record ought to have been served with notice.

In the event special leave to appeal to His Majesty in Council was given, but limited to the preliminary second

question stated as to failure to give proper notice of appeal to the Full Court, and not as extending to the general merits.

The Public Lands Ordinance of 1876 enacts by s. 6, sub-s. 7, that any final judgment in any such case as the present is to be subject to the like appeal to which other final judgments of the Court making the same are subject. By sub-s. 8 of the same section the Ordinance enacts : " The party who may desire to appeal against such judgment shall give notice to the other party and to the Court of his intention to appeal and proceed in other respects to perfect his appeal according to the Rules of Court for the time being regulating appeals, and if such notice is not given and the appeal perfected within the period prescribed the judgment of the Court shall be final."

By the Supreme Court Ordinance, 1876, the appellant is, in addition to other conditions which in the present case were complied with, to give notice of the appeal to all parties directly affected by the appeal, and to such others as respondents as the Court below thinks fit to direct. If the conditions prescribed have been complied with, and if application for final leave to appeal has been filed in the Court below not later than seven days after the expiration of a month, then the Court below must give leave to appeal, provided that where the conditions of appeal shall not have been perfected within such period as aforesaid or where the appeal shall for any reason have lapsed or been abandoned and the appellant shall again make application for leave to appeal, the Court may either refuse to grant leave or may impose any terms that it thinks proper in addition to the terms above mentioned. By r. 8 it is enacted that in every final judgment the Court of Appeal may give leave to appeal on such terms as that Court thinks just.

The Full Court gave judgment on March 7, 1921, upholding both preliminary objections, and dismissed the appeal with costs without going into the merits. Smyly C.J. based his decision, as already stated, only on the first ground, that the conditions prescribed by s. 6, sub-s. 8, of the Public Lands Ordinance, 1876, had not been complied with. He did not

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think that the Colonial Secretary, who had retired from the case, or the other claimant, who had taken no part in the proceedings, were parties "directly affected." But the other two judges were in favour of the respondent on both the preliminary objections, holding that notice of the appeal ought to have been given to the Colonial Secretary of the Colony and to the other original claimants.

On January 31, 1919, the Court of first instance had granted leave to appeal. Various motions for leave to appeal had previously been made ex parte, and the respondent was notified on January 7, 1919, that, conditional leave having been granted by the Court below, the appellant intended to appeal.

The substantial question before their Lordships is whether there was such a defect in the notice required as made the appeal incompetent. Smyly C.J., as has already been observed, took the view that two notices were essential, one that prescribed by s. 6, sub-s. 8, of the Public Lands Ordinance of 1876, and the other such a notice, together with the proper procedure, as was required by the rules of Court for the time being regulating appeals. The other two judges concurred with him in this view, but also held that the conditions of the procedure Order LIII., r. 7, had not been complied with. Differing from the Chief Justice, they considered that it was not sufficient that the respondent alone should have been served, but that the Colonial Secretary and the other claimants should have been notified, the former as having to pay the amount of the compensation, the latter as being entitled to establish a right to compensation if the right to the amount were established.

Their Lordships are unable to agree with the view taken by the latter two judges. In his original judgment, on July 24, 1918, the Chief Justice who tried the case made it quite clear that the amount of the compensation to be paid was treated as having been agreed to by the claimants to the ownership of the lands in question. The Colonial Secretary was therefore not required as a party to the appeal. He went on to state that it had been decided to try the question

of ownership as between the appellant and the respondent only, and that the amount awarded should be subject to the claims of the two other claimants if they should succeed in establishing their claims. He again made this clear at the end of his judgment. Their Lordships agree with what the Chief Justice said when sitting in the Court of Appeal on March 7, 1921, to the effect that neither the Colonial Secretary nor the claimant who, it had been argued, should have been served with notice of appeal, were under these circumstances parties directly affected.

But their Lordships are unable to concur in the opinion which the Chief Justice expressed, that the notice of intention to appeal must be a separate notice independent of the notice and procedure required by the rules of Court. It is, of course, true that the Public Lands Ordinance enacts by s. 6, sub-s. 8, already quoted, that the party who desires to appeal is to "give notice to the other party and to the Court of his intention to appeal and to proceed in other respects to perfect his appeal according to the rules of the Court for the time being regulating appeals." But their Lordships do not read these words as rendering it necessary that the notice made essential by them must be given in a separate form or on a physically separate piece of paper. All that is required is that it should be clear that "the other party" has been notified of the desire to appeal and that the procedure in the appeal should be in accordance with the rules of Court. The appellant has only in any sufficient fashion to make clear his intention to appeal and then, it may be uno flatu, to proceed with his appeal in proper form. Taking this to be the true meaning of the sub-section, their Lordships think that there was no defect in the procedure followed in the bringing of the appeal before the Full Court.

As the special leave given to appeal to the King in Council was confined to the objections raised to procedure and excluded any discussion on the merits, their Lordships will humbly advise His Majesty that the judgment of the Court below should be reversed in so far as it gave effect to the respondent's contention as to procedure, and that the appeal

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should go back to the Court of Appeal to be dealt with on the merits. The respondent will pay to the appellant the costs of the appeal to this Board, and in the appellate Court below. All other costs will be dealt with in the Court below.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondent: *Monro, Saw & Co.*

[PRIVY COUNCIL.]

J. C.* 1923 *March* 6.

CHAMPSEY BHARA AND COMPANY . APPELLANTS;

AND

JIVRAJ BALLOO SPINNING AND WEAVING COMPANY, LIMITED . } RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Arbitration — Finality of Award — Error of Law on Face of Award — Jurisdiction of Arbitrator.

An award of arbitration can be set aside on the ground of error of law on the face of the award only when in the award or in a document incorporated with it, as for instance a note appended by the arbitrator stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous.

The appellants sold cotton to the respondents by a contract which contained a submission to arbitration of disputes as to quality, and a further clause submitting to arbitration all other disputes arising out of the contract. Cotton was delivered but the respondents objected to its quality, and upon arbitration an allowance was awarded; the respondents thereupon rejected the cotton. The appellants claimed damages for the rejection, and upon that dispute being referred to arbitration under the further clause, were awarded damages. The award recited that the contract (the date and subject of which were stated) was subject to the rules of the Bombay Cotton Trade Association, which were not further referred to; and that the respondents had rejected on the grounds contained in a letter of a certain date. That letter stated merely that as the arbitrators had made an allowance of a certain amount the respondents rejected the cotton. The High Court set aside the award, holding that it was bad on its face, in that under one of the rules

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* *Present:* LORD DUNEDIN, LORD ATKINSON, and LORD WRENBURY.

of the Association the respondents were entitled to reject without liability:—

Held, that the award could not be set aside; the terms of the contract were not so incorporated with the award as to entitle the Court to refer to them as showing, either that the award was wrong in law, or that under them the contract, and therefore the jurisdiction of the arbitrators, were terminated.

Hodgkinson v. *Fernie* (1857) 3 C. B. (N. S.) 189 approved, and *Sanderson & Son* v. *Armour & Co.* 1922 S. C. (H. L.) 117 followed.

Landauer v. *Asser* [1905] 2 K. B. 184 distinguished.

CONSOLIDATED APPEALS (No. 73 of 1921, and No. 16 of 1922) from decree of the High Court in its appellate jurisdiction (July 29, 1919, and November 20, 1919) each reversing an order of the Court in its original civil jurisdiction.

The consolidated appeals arose out of petitions in the High Court to set aside two awards of arbitrators dated respectively September 23, 1918, and March 10, 1919.

The awards were made upon claims by the appellants, Champsey Bhara & Co., to damages for the rejection of cotton delivered under contracts expressed to be subject to the rules and regulations of the Bombay Cotton Trade Association. The facts sufficiently appear from the judgment of the Judicial Committee.

A petition to set aside the first award was rejected by Pratt J., but upon appeal the award was set aside. The appeal is reported at I. L. R. 44 B. 780. Shortly stated the learned judges (Macleod C.J. and Heaton J.) held that the terms of the contracts were so referred to in the award that the Court could take cognizance of them, that upon the true construction of r. 52 of the Association's rules the respondents had the option to reject the cotton without liability to damages, and that consequently there was an error on the face of the award.

A petition to set aside the second award was allowed by Kajiji J., who considered himself bound by the above decision of the appellate Court. Upon appeal his decision was reversed, Macleod C.J. and Heaton J. being of opinion that recitals in that award did not, as in the other award, so incorporate the terms of the contract as to entitle the Court to refer to them.

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In the first case the sellers, and in the second the buyers, appealed; the appeals were consolidated.

1923. Feb. 5, 6. *Upjohn K.C.* and *Wallach* for the appellants (sellers). The award could be set aside only for error apparent on its face, or upon a document forming part of the award. A reference by the arbitrators to a document in stating the facts does not entitle the Court to look at it, unless it is made part of the decision. The rules of the Association therefore could not be referred to. [Reference was made to *Hodgkinson* v. *Fernie* (1); *British Westinghouse Co.* v. *Underground Ry. Co.* (2); *Attorney-General for Manitoba* v. *Kelly.* (3)] *Landauer* v. *Asser* (4) is distinguishable. In that case the arbitrator stated the effect of the relevant term of the contract, and he based his award on the construction he put upon it; if the decision has a wider application it was erroneous.

[LORD DUNEDIN referred to *Holmes Oil Co.* v. *Pumpherston Oil Co.* (5)]

Sir George Lowndes K.C., *E. B. Raikes* and *Claughton Scott* for the respondents (buyers). The awards were made without jurisdiction. Upon the buyers' rejection of the cotton there was a repudiation, and the contract and submission ceased to operate. It is for the Court to inquire whether there was a repudiation and termination of the contract; if there was the arbitration clause does not apply: *Johannesburg Municipal Council* v. *D. Stewart & Co.* (6); *Piercy* v. *Young* (7); *Kennedy* v. *Barrow-in-Furness Corporation.* (8) Jurisdiction could not be obtained by an erroneous finding on the part of the arbitrators: *May* v. *Mills.* (9) The question has to be tried as though the buyers had sued for an injunction to restrain the arbitrators: *Sassoon & Co.* v. *Ramdutt Ramkissen Das.* (10)

(1) (1857) 3 C. B. (N. S.) 189, 202.
(2) [1912] A. C. 673.
(3) [1922] 1 A. C. 268, 281.
(4) [1905] 2 K. B. 184.
(5) (1891) 18 R. (H. L.) 52.
(6) 1909 S. C. (H. L.) 53.
(7) (1879) 14 Ch. D. 200, 207, 208.
(8) Hudson's Building Contracts, vol. ii., 411, 415.
(9) (1914) 30 Times L. R. 287.
(10) (1922) L. R. 49 I. A. 366, 373.

[LORD DUNEDIN referred to *Sanderson & Son* v. *Armour & Co.* (1)]

The present case is distinguishable, because on the documents there was at least a prima facie case of repudiation. Further, in Scotland a submission to arbitration acts as a complete ouster of the jurisdiction of the Court, whereas in India, as in England, it does not.

March 6. The judgment of their Lordships was delivered by

LORD DUNEDIN. In these consolidated appeals it will be convenient to consider the first case by itself. The appellants as sellers entered into two contracts with the respondents as buyers of certain bales of cotton. The contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Ld. Rule 12 of the said Association provides: "All questions or disputes as to quality between buyer and seller shall be referred to the arbitration of two disinterested persons, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator. The award made by such arbitrators or any two of them shall be final and binding subject only to the right of appeal to the Appeal Committee. All arbitrations held under this rule must be held in accordance with r. 5, and only shareholders and/or Directors shall be eligible to act on arbitrations held in the rooms of the Association. Associate members, however, shall be eligible to act as arbitrators when the arbitration is held in the seller's jetha and/or godown as provided under r. 5."

Rule 13 provides: "All questions in dispute (other than that of quality) arising out of, or in relation to, contracts made subject to the Rules and Regulations of The Bombay Cotton Trade Association, Limited, provided one of the parties to the contract is a member or associate member of the Association, shall be referred to the arbitration of two disinterested persons being shareholders or directors of the Association, one to be chosen by each disputant; such arbitrators having the power to call in a third arbitrator who

(1) 1922 S. C. (H. L.) 117.

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must also be a shareholder or director of the Association. The award made by such arbitrators or any two of them shall be final and binding on both parties, subject only to the right of appeal to the Board within 15 days of the date of the arbitrators' award on payment of Rs.100."

The cotton was delivered but objected to by the respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under r. 12 made an award as to quality. Thereupon, the respondents rejected the cotton. The appellants retorted by claiming damages. This dispute was referred to arbitrators under r. 13.

They issued their award as follows: "To all to whom these presents shall come, we, Purshotamdas Thakoredas of Bombay, Hindu inhabitant, and Vincent Alpe Grantham, also of Bombay, European inhabitant, send greeting. Whereas by a contract dated August 17, 1918, Messrs. Champsey Bhara and Co. had agreed to sell to the Jivraj Balloo Spinning and Weaving Co., Ld., 100 bales of Mundra M. G. Fully Good Staple cotton on the terms and conditions mentioned in the contract. And whereas by another contract dated September 4, 1918, the said Messrs. Champsey Bhara and Co. had also agreed to sell to the said Jivraj Balloo Spinning and Weaving Co., Ltd., 100 bales of New M. G. Mundra Cotton Fully Good Staple on the terms and conditions therein contained. And whereas both the said contracts were made subject to the rules and regulations of the Bombay Cotton Trade Association, Ld. And whereas the goods tendered under the said contracts by the said Messrs. Champsey Bhara and Company were rejected by the Jivraj Balloo Spinning and Weaving Co., Ld., on the grounds contained in their letters dated November 25, 1918, and November 11, 1918, respectively. And whereas the said Messrs. Champsey Bhara and Co. claimed from the said Jivraj Balloo Spinning and Weaving Co., Ld., the sum of Rs.25,000 in respect of the aforesaid contracts. And whereas the said Jivraj Balloo Spinning and Weaving Co., Ld., denied liability in respect of the said sum or any part thereof. And whereas the said disputes

were referred to the arbitration of us, Purshotamdas Thakoredas and Vincent Alpe Grantham, who were appointed arbitrators by the Deputy Chairman of the Bombay Cotton Trade Association, Ld. And whereas on December 12 the time for making our award was extended by the Deputy Chairman to December 27, 1918. Now know ye that we, the said Purshotamdas Thakoredas and Vincent Alpe Grantham, having taken upon ourself the burden of the said reference, and having done all acts necessary to enable us to make a valid award, hereby make our award as follows, that is to say :—We award and direct that the said Jivraj Balloo Spinning and Weaving Co., Ld., do pay to the said Messrs. Champsey Bhara and Co. the sum of Rs.25,000, and we do further award and direct that the said Jivraj Balloo Spinning and Weaving Co., Ld., do pay the costs of this our award, which we assess at the sum of Rs.55. In witness whereof we have hereunto set our respective hands this December 23, 1918."

An appeal was made to the Appeal Committee, who confirmed the award.

The respondents then presented a petition to the Court asking that the award should be set aside. They alleged two grounds : (1.) that there was no question referable to the arbitrators under r. 13 ; (2.) that there was an error of law on the face of the award. The case depended before Pratt J., who dismissed the petition. Appeal was taken to the Appellate Division of the High Court, and they reversed the judgment holding that there was an error in law on the face of the award.

The way in which the learned judges arrived at that conclusion was this : They said that the recital that the respondents had rejected the cotton on the grounds mentioned in the letters of November 11 and 25, 1918, respectively, allowed them to look at the letters. The letter of November 11 from the respondents to the appellants is as follows : "Re : D/Order No. 27 dated 6.11.18 for 100 bales N. M. G. Mundra. Please note that at the survey held this day on the above lot tendered by you against contract No. 56, dated 4.19.8 as the arbitrators have in their award

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allowed Rs.10½ off, we hereby reject the said lot and refuse to take delivery thereof." The letter of November 25 is in identical terms referring to the other contract. The learned judges then held that if r. 52 of the regulations is looked at —it being the clause which deals with what is to happen when arbitrators, as to quality, make certain findings—it becomes apparent that the arbitrators here could only have arrived at their judgment if they entirely misinterpreted that clause. They based their opinion upon the case of *Landauer* v. *Asser*. (1)

The law on the subject has never been more clearly stated than by Williams J. in the case of *Hodgkinson* v. *Fernie* (2): "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . . The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established." This view has been adhered to in many subsequent cases, and in particular in the House of Lords in *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (3)

The question to be decided is: Does the error in law appear on the face of the award? In the *British Westinghouse Case* (3) it clearly did. The arbitrator had stated a special case and got an opinion of the Divisional Court in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award.

In *Landauer* v. *Asser* (1) the state of affairs was different.

(1) [1905] 2 K. B. 184. (2) 3 C. B. (N. S.) 189, 202.
(3) [1912] A. C. 673.

The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus: "I decide that as the parties to the contract dated November 3, 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to and only to the said amount, the balance one way or the other being due from or to the sellers." The Court of Appeal held that this entitled them to look at the contract and to come to the conclusion that the decision was erroneous in law. The case of *Landauer* v. *Asser* (1) is not binding on their Lordships, and it was contended that it was wrongly decided, but in their Lordships' opinion it is not necessary to consider that point, for the present case differs from that case in an essential particular. In that case the legal proposition was stated in terms on which the award proceeded. In the present case, no legal proposition at all is stated as a ground of the award. The reference to the letters is only in the narrative, and even when the letters are looked at they only contain the view of one party. To make this case equiparate with *Landauer* v. *Asser* (1) the award would have to run somewhat thus: "In respect of the ground of rejection contained in the letters of November 11 and 25, and in respect of rule 52 of the Association, I decide that, etc."

Now the regret expressed by Williams J. in *Hodgkinson* v. *Fernie* (2) has been repeated by more than one learned judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first

(1) [1905] 2 K. B. 184. (2) 3 C. B. (N. S.) 189.

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what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting r. 52." But they were entitled to give their own interpretation to r. 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt J. was right and the conclusion of the learned judges of the appellate Court erroneous.

The counsel for the respondents then argued the other point, which the learned judges of the appellate Court found it unnecessary to decide, and which the trial judge decided against them. He said that upon a proper construction of the contract the moment his client rejected the cotton in virtue of the decision by the arbitrators as to quality, he was entitled to do so, and the contract was repudiated or came to an end; that then the arbitration clause could no longer be appealed to, and he said that inasmuch as this was a plea to jurisdiction the Court ought to decide it.

Their Lordships think that this argument is based upon a confusion of thought. The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which has arisen is a dispute covered by r. 13 of the Association. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question whether it

depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the Court to decide what is the effect of a rejection based on an award as to quality. In truth this point is decided in terms by the recent case of *Sanderson & Son* v. *Armour & Co.* (1) It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland.

The decision of the first appeal in this sense disposes of the second appeal without further argument, as it is obvious that in that case even the reference in the narrative to the grounds of defence in the letters is absent, and there is nothing but the bare statement that a certain sum was awarded. It follows that in the first appeal the appeal must be allowed and the judgment of the trial judge restored; the appellants must have their costs here and in the Courts below. The second appeal must be dismissed and the respondents will have their costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*
Solicitors for respondents: *Hughes & Sons.*

(1) 1922 S. C. (H. L.) 117.

[HOUSE OF LORDS.]

H. L. (E.) 1923 *March* 16.

MERSEY DOCKS AND HARBOUR BOARD . . . . . } Appellants;

AND

HAY AND OTHERS . . . . . Respondents.

(S.S. THE COUNTESS—LIMITATION.)

MERSEY DOCKS AND HARBOUR BOARD . . . . . } Appellants;

AND

HAY AND OTHERS . . . . . Respondents.

(S.S. THE COUNTESS—DETINUE.)

THE Orders in these appeals had not been finally settled when the report of the case went to press. (See ante, p. 345.) They are as follows:—

In the Limitation appeal:—

Ordered and adjudged that the Order of the Court of Appeal be discharged: Further ordered that on the discharge by the respondents, the owners of the steamship Countess, of the full amount of their liability hereinafter specified—namely, 4468*l.* 4*s.* 9*d.*, *so much of the decree of the President of the Probate, Divorce and Admiralty Division as* (*i.*) *pronounced that the owners of the steamship Countess were entitled to limited liability according to the provisions of the Merchant Shipping Acts,* 1894 *to* 1906, *and were answerable in damages to an amount not exceeding* 4468*l.* 4*s.* 9*d. in respect of loss of or damage to ships goods and other things on the occasion of the collision in the said decree mentioned;* (*ii.*) *ordered that, upon payment of the costs incurred on behalf of the plaintiffs in several actions in the said decree mentioned respectively, all further proceedings in the said actions be stayed; and* (*iii.*) *condemned the owners of the steamship Countess in the costs of the action, be restored: Further ordered that the respondents, the owners of the steamship Countess, do pay to the appellants the*

costs incurred by them in the Court of Appeal: Further ordered that the respondents, the owners of the steamship Countess, and the respondents, the owners of the barge Francis, do pay to the appellants the costs incurred by them in respect of the appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: Further ordered that the cause be remitted back to the Admiralty Division of the High Court to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 16, 1923.

In the Detinue appeal:—

Ordered and adjudged that the Order of the Court of Appeal be varied by omitting therefrom the words "and with the addition in lieu thereof of an order that the said sum of 4451*l.* 13*s.* 1*d. do remain in Court until further order with liberty to either party to apply as to payment out"; and further ordered that the sum of* 4451*l.* 13*s.* 1*d. be paid out of Court to the appellants, and that the owners of the steamship Countess do pay to the appellants the further sum of* 16*l.* 11*s.* 8*d.* (*making in all the sum of* 4468*l.* 4*s.* 9*d.*), *pursuant to their undertaking: Further ordered that the respondents, the owners of the steamship Countess, do pay to the said appellants the costs incurred by them in the Courts below, such costs to be taxed as between solicitor and client: Further ordered that the respondents, the owners of the steamship Countess, and the respondents, the owners of the barge Francis, do pay to the said appellants the costs incurred by them in respect of the appeal to this House, such costs to be taxed as between solicitor and client and the amount thereof to be certified by the Clerk of the Parliaments: Further ordered that the cause be remitted back to the Admiralty Division of the High Court to do therein as shall be just and consistent with this judgment.*

Lords' Journals, March 16, 1923.

[HOUSE OF LORDS.]

H. L. (E.)* 1923 May 4.

UNIVERSAL STEAM NAVIGATION COMPANY, LIMITED . . . . } Appellants;

AND

JAMES McKELVIE AND COMPANY . . Respondents.

Shipping—Charterparty—Demurrage—Principal and Agent—Signature by Charterers "as agents"—Signatories described as "charterers" in Body of Charterparty—Personal Liability of Agents.

A charterparty was expressed to be made "between T. H. S. & Co., agents for the owners" of a steamer, "and J. McK. & Co., Charterers," and was signed "For and on behalf of J. McK. & Co. (as Agents), J. A. McK." The steamer was to load a cargo of coal on the Tyne and proceed to a foreign port, and provision was made for the payment by the "charterers" of demurrage in the event of the steamer being detained beyond the stipulated time either at the port of loading or at the port of discharge. The charterparty contained numerous other provisions imposing obligations on "the charterers." The owners were aware at the time when the charterparty was signed that J. McK. & Co. were acting for other persons. In an action by the owners against J. McK. & Co. for demurrage at the port of discharge:—

Held, that the defendants having signed as agents were not liable as principals to pay demurrage, notwithstanding that they were described as charterers in the body of the charterparty.

Gadd v. *Houghton* (1876) 1 Ex. D. 357 approved.

Lennard v. *Robinson* (1855) 5 E. & B. 125 overruled.

Decision of the Court of Appeal [1922] 1 K. B. 518 affirmed.

Appeal from an order of the Court of Appeal (1) reversing a judgment of Bailhache J.

The facts are fully stated in the report of the case in the Court of Appeal, and they sufficiently appear from the judgment of the Lord Chancellor.

1923. March 12. *Leck K.C.* and *E. Aylmer Digby* for the appellants. The question is whether the signature of the respondents "as agents" was meant to control the whole of the document, or whether by the express terms of the document the persons so signing have not undertaken personal

* *Present:* Viscount Cave L.C., Earl of Birkenhead, Lord Shaw of Dunfermline, Lord Sumner, and Lord Parmoor.

(1) [1922] 1 K. B. 518.

liability. The terms of this charterparty show that the respondents were making themselves parties to the contract and personally liable thereunder. The respondents, to escape personal liability, should have said "as agents for the charterers" in the body of the contract. The fact that the agents are described in the contract as "charterers" shows that they have accepted liability thereunder, especially where, as in this case, the charterparty shows various things to be done in this country which could only be done by the charterers. If the contract clearly states who is the charterer that is not done away with by the signature of the charterer "as agent," and the owner need not trouble further. In all cases where the agent has been held not personally liable the principal has been disclosed. *Lennard* v. *Robinson* (1), which is recognized as an authority in *Wake* v. *Harrop* (2), governs this case: and see *Higgins* v. *Senior*. (3) *Gadd* v. *Houghton* (4) was not a case of a charterparty and is distinguishable. [Counsel also referred to the Bills of Exchange Act, 1882, s. 26, sub-s. 1.]

[VISCOUNT CAVE L.C. referred to Story on Agency, 9th ed., § 267, and Pollock on Contract, 9th ed., p. 104; and LORD SHAW OF DUNFERMLINE referred to Bell's Principles, 8th ed., § 224*a*.]

Raeburn K.C. and *S. L. Porter* for the respondents were not called on.

The House took time for consideration.

1923. May 4. VISCOUNT CAVE L.C. My Lords, this appeal from the Court of Appeal in England raises the question whether the respondents, Messrs. James McKelvie & Co., are personally liable under a charterparty for demurrage.

By the charterparty, which was dated October 15, 1919, and was expressed to be made between T. H. Seed & Co., Ld., agents for the owners of the steamship *Ariadne Irene* and "James McKelvie & Co., Newcastle-on-Tyne, Charterers," it was agreed that the steamship should proceed to the river

(1) 5 E. & B. 125.
(2) (1861) 6 H. & N. 768.
(3) (1841) 8 M. & W. 834, 844.
(4) 1 Ex. D. 357.

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Tyne and there load from the charterers a full and complete cargo of coal, and should proceed to one of certain Italian ports as ordered, and there deliver her cargo. Provision was made for the payment by the charterers of demurrage in the event of the steamer being detained beyond the stipulated time either at the port of loading or at the port of discharge, and it was provided that "the charterers' liability should cease as soon as the cargo was shipped and the advance of freight, dead freight and demurrage at the ports of loading and/or discharging (if any) paid, the owner having a lien on the cargo for freight and average." The charterparty was signed: "For and on behalf of James McKelvie & Co. (as agents). J. A. McKelvie." Liability for demurrage at the port of discharge having been incurred, the owners brought this action against the respondents for the amount claimed—namely, 2444*l.* 12*s.* 6*d.*—and the respondents pleaded that they had signed the charterparty as agents for the firm of Brandt Pagnini of Rome, and denied liability.

At the trial of the action before Bailhache J. it was proved that the respondents had sold a cargo of coal to Pagnini & Co. at a price per ton, f.o.b. Newcastle, and had chartered the vessel for this cargo as agents for and on behalf of that firm. It was also proved that it was customary when selling f.o.b. to charter on behalf of the receivers, and that the custom was well known to ship-agents and shipowners. Under the regulations of the Coal Controller coal could only be exported under licence naming the consignees; and in the licence for this cargo, which was referred to in the charterparty as having been granted, Pagnini & Co. were named as consignees. The bill of lading, which was signed by the agent for the shipowners, showed a shipment to the order of Pagnini. The representative of the shipowners in his evidence maintained that he dealt only with the respondents; but his answers to certain questions, and his refusal to answer others, leave no doubt in my mind that he knew perfectly well that the respondents were acting for other persons. It was not suggested that the respondents ever withheld the name of their principals. The learned judge found as a fact that

the owners knew when the charterparty was signed that the cargo was sold on f.o.b. terms; but on the authority of the case of *Lennard* v. *Robinson* (1) he held that the respondents were personally liable, and gave judgment for the plaintiffs for the amount claimed. The Court of Appeal by a majority (Bankes and Atkin L.JJ.; Scrutton L.J. dissenting) reversed that decision and entered judgment for the respondents with costs; and thereupon the present appeal was brought.

My Lords, apart from authority, I should feel no doubt whatever as to the correctness of the judgment of the Court of Appeal. If the respondents had signed the charterparty without qualification, they would of course have been personally liable to the shipowners; but by adding to their signature the words "as agents" they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no sense or meaning at all.

When the cases are examined, it appears that the weight of authority is in favour of the above view. It is true that in a series of cases, in which the signatories were referred to in the body of the contract as agents for others, but appended no qualification to their signature, they were held to be personally liable. Decisions to that effect were given in *Tanner* v. *Christian* (2); *Cooke* v. *Wilson* (3); *Parker* v. *Winlow* (4); *Paice* v. *Walker*. (5) Whether all those decisions can stand with the later decisions of the Court of Appeal in *Southwell* v. *Bowditch* (6) and *Gadd* v. *Houghton* (7) it is not necessary for present purposes to determine; for in none of them was the signature qualified by any words showing that the signatory signed as agent only, and in each of them it was expressly stated in the judgment that if the signature had been so qualified the decision would or might have been

(1) 5 E. & B. 125.
(2) (1855) 4 E. & B. 591.
(3) (1856) 1 C. B. (N. S.) 153.
(4) 7 E. & B. 942.
(5) (1870) L. R. 5 Ex. 173.
(6) (1876) 1 C. P. D. 374.
(7) 1 Ex. D. 357.

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the other way. On the other hand, in *Deslandes* v. *Gregory* (1), where the defendants were described both in the body of the charterparty and in the signature as agents for a known person, they were held not liable; and in *Gadd* v. *Houghton* (2) James L.J. said that he could not conceive that the words "as agents" could be properly understood as implying merely a description, adding, "the word 'as' seems to exclude that idea."

To this current of authority the only exception is the case of *Lennard* v. *Robinson* (3), on which the learned trial judge and Scrutton L.J. relied. There the defendants were named in the charterparty itself as parties, but signed "by authority of and as agents for" a person named; and it was held that they contracted personally. There may be minute distinctions between that case and the present; but I think it best to say that in my opinion that case cannot now be treated as law. It is, as Bankes L.J. said, to the interest of the commercial community that a signature "as agent" should have a generally accepted meaning, and I agree with him that such a qualification of the signature should be taken as a deliberate expression of intention to exclude any personal liability on the part of the signatory.

I think it desirable to add, in order to prevent misapprehension, that in the present case no evidence was given (as in *Pike* v. *Ongley* (4), and the cases there cited) of any custom of the trade or port that agents not disclosing the names of their principals at the time of making a contract were personally liable as principals; nor was it suggested (as in *Miller, Gibb & Co.* v. *Smith & Tyrer, Ld.* (5)) that there was any general or special custom that an agent acting on behalf of a foreign principal undertook the liability of a principal. In the absence of such a custom, and where a principal exists, the general rule applies, although the principal be not named or be a foreigner.

For these reasons, I am of opinion that this appeal fails,

(1) (1860) 2 E. & E. 602. On appeal 30 L. J. (Q. B.) 36.
(2) 1 Ex D. 357.
(3) 5 E. & B. 125.
(4) (1887) 18 Q. B. D. 708.
(5) [1917] 2 K. B. 141.

and I move your Lordships that it be dismissed with costs.

My Lords, my noble and learned friend, Lord Birkenhead, desires me to say that he agrees with the judgment of Atkin L.J., but subject to the qualification contained in the opinion to be delivered by my noble and learned friend, Lord Sumner.

LORD SHAW OF DUNFERMLINE. My Lords, the question in this appeal is whether the respondents are liable to payment of demurrage in discharging a cargo of coal from the steamship *Ariadne Irene*. The liability is said to arise under the terms of the charterparty founded on : the respondents deny liability ; and they plead that the charterparty was entered into by them as agents and, as they submit, solely as agents, for a firm, Brandt Pagnini, of Rome.

The charterparty states that " the licence for the above cargo is granted." The meaning of that is, that, under the regulations of the Coal Controller operative during this contract, a licence was required which stated the names of the consignees. The licence for this cargo of coal named Pagnini as the consignees. Further it is admitted in the cross-examination of Messrs. Seed & Co.'s manager that the bill of lading for this cargo " shows a shipment to the order of ' Brandt Pagnini, Esq., of Rome ' and his assigns."

In my opinion accordingly no question of undisclosed principal arises in this case. When, in signing this charterparty, the respondents added to their signature the words " agents," the owners knew that principals existed, and who they were.

In the opening words of the charterparty, the contract bears to be between Messrs. Seed & Co., agents for the owners of the ship, and " James McKelvie & Co., Newcastle-on-Tyne, Charterers." Throughout the body of the charterparty the term " charterers " is employed. There is : (1.) no acceptance, in any express words employed, of personal obligation, but the name of Messrs. McKelvie is used simpliciter, and the word " charterers " follows that name and is repeated in the

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course of the contract; (2.) There is no assertion of agency in the language employed in the body of the contract. All this until the signatures are reached. The signature of the charterers was as follows: "For and on behalf of James McKelvie & Co. (as Agents). J. A. McKelvie."

The first question is in what character Messrs. McKelvie signed this document? I see no ground whatsoever for denying effect to the express word "agents": it was undoubtedly in that character that the contract was signed: there is as little ground for cutting out the express character in which it was signed as for cutting out the signature itself.

The second question is, whether, although thus denominating themselves as "agents," Messrs. McKelvie were yet signing a contract which by its terms made them principals therein. But its terms do not refer to either "principals" or "agents"; the body of the document can be applied to either category. As for the names of the parties, I hold that the names of McKelvie followed by "Charterers" with nothing said of agency, is definitely stamped with agency by the express affirmation of the signature.

A third view is suggested—namely, that they were ex concessu agents, but yet were principals over and above. This answers itself. Such a confused and unusual situation would require the clearest words to make it intelligible and effective. As at present advised, I have doubts as to whether this could be done.

I do not regret that the appeal has been taken, for it enables this House to settle the question whether on the numerous authorities the judgment in the case of *Lennard* v. *Robinson* (1) is sound law. In my humble opinion it is not; the cases of *Gadd* v. *Houghton* (2) and *Lennard* v. *Robinson* (1) cannot stand together. *Gadd's Case* (2), which was decided by a very powerful Court, was, in my view, correctly decided; and it has, from its date, been properly accepted as sound. The authorities are most carefully reviewed in the judgment in this case by Bankes L.J., and it is unnecessary to add to that review.

(1) 5 E. & B. 125. (2) 1 Ex. D. 357.

But I desire to say that in my opinion the appending of the word " agents " to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that, the appending of the word " agent " to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party.

LORD SUMNER. My Lords, it is reasonably plain, that in this case there was no contract between the parties until the formal charter was signed. The main terms had no doubt been already agreed by word of mouth, but, in the ordinary course of business, they would have to be incorporated into a printed form and that form would then have to be duly signed. The result is, that the whole question is one of the construction of the entire charter, as we have it, including the form in which it is signed—namely, in the name of James McKelvie & Co. " (as agents)."

Atkin L.J. observes (1) that " some confusion has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent in the signature," and he proceeds: " the words ' as agents ' are conclusive, when qualifying the signature, to negative liability as principal. . . . . If used in the body of the document they are very strong to negative liability, but as you must read the document as a whole you may possibly find other words and clauses so plainly indicating personal liability that they outweigh the words in question. . . . . If the words qualify the signature they qualify the assent and nothing more matters."

My Lords, for myself, I can hardly go so far as this. I agree that for many years past it has, I believe, been generally understood in business, that to add " as agents " to the

(1) [1922] 1 K. B. 536.

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signature is all that is necessary to save a party, signing for a principal, from personal liability on the contract, and I agree also that, even as a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in ad hoc, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still, however, remains true, that the qualifying words " as agents " are a part of the contract and must be construed with the rest of it. They might have been expressed as a separate clause—e.g., " it is further agreed that the party signing this charter as charterer does so as agent for an undisclosed principal "—and that clause would obviously have to be construed. They are a form of words and not a mere part of the act of signifying assent and closing a negotiation by duly attaching a name. They purport to limit and explain a liability, and not merely to identify the person signing or to justify the inscription of a name by the hand of another person than the owner of it They are more than the addition of " junior " or " Revd." to the signature, which serves to identify the signatory by distinguishing him from others They are more than a mere " per procuration," which only alleges authority to write another's name. If Mr. J. A. McKelvie had written in his own handwriting " Brandt Pagnini & Co." and no more, then, on proof of due authority, Brandt Pagnini & Co. would have been bound by the charter and (subject to the effect of the words at the beginning of the charter " and James McKelvie & Co., Newcastle-on-Tyne, charterers ") McKelvie & Co. would not. There are, of course, persons and occasions such that no inference of personal engagement can arise, as when a barrister signs a memorandum of the settlement of a case recording that money is to be paid, or when a Treasury clerk signs a letter, stating that he is " directed by my Lords of the Treasury to say " so and so. In such a case as the present, however, the act of attaching the signature of J. McKelvie & Co., even without the words above quoted from the body, would prima facie indicate a personal undertaking and that so strongly that, in the absence of qualifying words, evidence could not

be admitted to discharge Messrs. McKelvie but could be admitted only to charge Messrs. Pagnini. I think it follows, that the words " as agents," which as a matter of construction may be sufficient to discharge Messrs. McKelvie, have that effect because they form part of the contract and, if they are conclusive, it is by reason of their meaning as part of the contract and not because they are part of the proof of assent to a contract, which is itself distinct from them.

They are more, too, than words of description of the signatory's business. It has sometimes been said that when " agents " is the word added to the signature, it is a mere word of description, and so does not qualify the liability which the act of signing imports. I question this explanation. One's signature is not the place in which to advertise one's calling, nor is " agent " ordinarily used to describe a trade, as " tailor " or " butcher " would be. I have no doubt that, when people add " agent " to a signature to a contract, they are trying to escape personal liability, but are unaware that the attempt will fail. The result, however, is the same. When words added to a signature in themselves qualify liability, it is because, as words, they can be so construed in conjunction with the contract as a whole.

In construing the words " as agents," there is a distinction to be taken. Though it may be somewhat subtle, it has been mentioned in the older cases. Do the words " as agents " mean " and as agents," or " only as agents " ? The positive affirmation, that I sign " as agent "—that is, for another—is formally consistent with my signing for myself as well. If the act of signing raises a presumption of personal assent and obligation, which has to be sufficiently negatived or qualified by apt words, are the words " as agent " apt or sufficient to exclude personal liability ? For myself, I think that, standing alone, they are. To say " as agent," meaning thereby " also as agent " for some one undisclosed, is substantially useless. If the agent refuses to disclose, the opposite party is no better off. If the statement is true, the rights and liabilities of the principal can be established at any time by proof. The statement only acquires a business efficacy

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as distinct from a formal content, if it means " I am not liable but someone else is and he only," and this is what I think it does mean.

Unless, then, something is to be found to the contrary in the earlier part of this charter, the qualification " as agents " appears to me to relieve Messrs. McKelvie & Co. from personal liability on the contract. There are two features in the charter sufficiently significant to be worth considering in this connection—one is that, of the very numerous stipulations in their favour, which the shipowners are entitled to have performed by somebody, those performable by charterers eo nomine in this country are more numerous than those performable by charterers eo nomine in Italy, since in the latter case many of them are expressed to be performable by " consignees " or by " receivers " ; the other is, that the charter begins by saying " It is this day mutually agreed between Thomas H. Seed & Co., Ltd., agents for owners, and James McKelvie & Co., Newcastle-on-Tyne, charterers."

These features, so common as to be almost common form, are of little weight in aid of the appellants' contention here. If throughout the charter " James McKelvie & Co." is to be read wherever the word " charterers " is found, I think, reading the whole instrument together and giving effect to every part of it, that " James McKelvie & Co. as agents " must be so read in lieu of the word " charterers," and then matters are left as they were on the meaning of the words " as agents." The circumstance that Thos. H. Seed & Co. are described as agents for owners and sign " by authority of owners as agents " carries things no further ; " by authority of owners " would be implied in any case, and the repetition of " as agents " is a repetition only. What can be the meaning of saying " James McKelvie & Co., on behalf of their principal, engage that James McKelvie & Co., as charterers, shall pay steamer demurrage at Cività Vecchia " except that they bind their principal to authorize them to pay for him and to put them in funds to do so ? The construction comes back to the same point, that the addition of the words " as agents " has the effect of reading all references to James McKelvie & Co.

in the obligations undertaken by the charterers, as if James McKelvie & Co. had been throughout described as agents for charterers, as Thos. H. Seed & Co. are for owners. I may add that clause 16 seems to corroborate this view. It runs "the brokerage of 5% is due to Thos. H. Seed & Co., Ltd., one-third of which to James McKelvie & Co. on the cargo being loaded." However this is read, it plainly puts McKelvie & Co. and Seed & Co. on exactly the same footing, and Seed & Co. are admittedly agents for others in this matter and nothing more.

As to the authorities, I think that *Gadd* v. *Houghton* (1) cannot be usefully distinguished from *Lennard* v. *Robinson* (2) merely because Houghton was a selling agent and Robinson was a chartering agent. The reasoning in the former case seems to me to be correct and it ought to prevail. The strongest argument for *Lennard* v. *Robinson* (2) is that Mellish L.J., when counsel for the defendant in *Wake* v. *Harrop* (3), accepted it as good law against his client, manifestly to the disappointment of Bramwell B., and did not criticise it in *Gadd* v. *Houghton* (1), although it had been cited. I think the weight of authority has long been against *Lennard* v. *Robinson* (2), though it has been cited often and sometimes has been expressly followed, and I can see no good purpose to be served by keeping it alive as an authority, to be followed if an exactly similar case should arise for decision but not otherwise. I think it was ill decided and that in the present case the judgment appealed against was right.

LORD PARMOOR (read by LORD SHAW OF DUNFERMLINE). My Lords, the question in this appeal is whether the respondents are personally liable, under the terms of a charterparty, for demurrage, in discharging the steamship *Ariadne Irene*. The defence of the respondents is that they signed the charterparty "as agents," and did not incur thereunder any personal liability. The charterparty was signed as follows: "For and on behalf of James McKelvie & Co. (as

(1) 1 Ex. D. 357. (2) 5 E. & B. 125.
(3) 6 H. & N. 768.

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agents).—J. A. McKelvie." The words "as agents" are, in my opinion, clearly words of qualification and not of description. They denote, in unambiguous language, that the respondents did not sign as principals, and did not intend to incur personal liability. The signature applies to the whole contract, and to every term in the contract. I think it would not be admissible to infer an implied term, or implied terms, in the contract inconsistent with the limitation of liability directly expressed in the qualification of the signature, since the effect of such an implication would be to contradict an express term of the contract. It is not impossible that by plain words in the body of the document, persons signing "as agents," may expressly undertake some form of personal liability as principals, but I can find no trace of any intention of the respondents to incur any such liability in the charterparty, which is in question in the present appeal.

The authorities have not been consistent, but I agree that *Gadd* v. *Houghton* (1) should be followed. In *Gadd* v. *Houghton* (1), James L.J., referring to the case of *Paice* v. *Walker* (2), says: "I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand." Mellish L.J. expresses the same opinion, and adds, "when the signature comes at the end you apply it to everything which occurs throughout the contract." Archibald J. adds: "The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent."

In *Deslandes* v. *Gregory* (3) the signature was "For S. F. of Anamaboo, G. Brothers, as agents." An action was brought by the shipowners against G. Brothers. It was held in the Queen's Bench, and confirmed in the Exchequer Chamber, that the defendants were not liable on the charterparty as

(1) 1 Ex. D. 357, 359, 360, 361.
(2) L. R. 5 Ex. 173.
(3) 2 E. & E. 602; 30 L. J. (Q. B.) 36, 37.

principals. Williams J., delivering the judgment of the Exchequer Chamber, says: "The form of the agreement and the mode of signature taken together, are quite conclusive that the defendants did not sign this contract for themselves as principals. They sign 'For Samuel Ferguson, of Anamaboo, Gregory Brothers, as agents.'" No doubt in this case G. Brothers are described as agents in the body of the charterparty, but Williams J. says: "It would require extremely strong words in the body of the contract to control the effect of that form of signature, but no such words are to be found there."

When this case was heard, in the first instance, before Bailhache J., the only authority quoted was *Lennard* v. *Robinson*. (1) If this authority had not been overruled, it would have been incumbent on Bailhache J. to follow it. I think, however, that *Lennard* v. *Robinson* (1) is not reconcilable with *Gadd* v. *Houghton* (2) and that, since the decision in that case, it cannot be regarded as an authority. In *Lennard* v. *Robinson* (1) the contract was signed "by authority of and as agents for," and as stated in *Gadd* v. *Houghton* (2) it is not possible to suggest clearer words to show that the person signing the contract is signing for a principal, and does not intend to incur personal liability. The construction applied in *Lennard* v. *Robinson* (1) was applied in *Weidner* v. *Hoggett* (3), in which the defendant was held personally liable under contract signed by him, "on account of Bebside Colliery, W. Hoggett."

Different considerations arise when a person signs a contract without qualification, and the question is raised whether he is to be deemed as contracting personally, or as agent only. In such a case the intention of the parties is to be discovered from the contract itself, and the rule laid down in Smith's Leading Cases has been adopted as the rule to be followed. "That where a person signs a contract in his own name, without qualification, he is prima facie to be deemed to be a person contracting personally, and in order to prevent this

(1) 5 E. & B. 125. (2) 1 Ex. D. 357.
(3) (1876) 1 C. P. D. 533.

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liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." I agree with Atkin L.J. that it would tend to confusion to consider these cases in a case in which the signature itself has been expressly qualified.

Atkin L.J., in giving his decision in the present case, says: "If the words qualify the signature, they qualify the assent, and nothing more matters." I do not understand Atkin L.J. to exclude the possibility that a person, signing "as agent," may nevertheless in the same document expressly undertake some form of personal liability. Such a possibility does not, in my opinion, affect the value of the rule as laid down by Atkin L.J., or its acceptance as an accurate guide in the construction of contracts, not regulated by statute, or considerations of a special character. The rule accords with the dictum of Mellish L.J. in *Gadd* v. *Houghton* (1), "when the signature comes at the end you apply it to everything which occurs throughout the contract."

In my opinion the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 4, 1923.

Solicitors for the appellants: *Downing, Middleton & Lewis.*
Solicitors for the respondents: *Thomas Cooper & Co.*

(1) 1 Ex. D. 357, 360.

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE APPELLANTS ; AND PORT OF LONDON AUTHORITY . . . RESPONDENTS.

H. L. (E.)*
1923
May 4.

Revenue—Excess Profits Duty—Port Authority—Capital—Pre-War Standard—Purchase of Dock Undertakings in consideration of Issue of Port Stock—"Unpaid purchase money"—"Borrowed money"—"Debts"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *ss.* 3, 16, 18, 19, 20, 21—*Finance (No.* 2) *Act*, 1915 (5 *& 6 Geo.* 5, *c.* 89), *Sch. IV., Part III., rr.* 1, 2, 3.

By the Port of London Act, 1908, the Port of London Authority acquired the property of the three leading dock companies of London. The consideration for the transfer was the issuing by the Authority to the companies or their nominees of some 22,000,000*l.* of Port stock, A stock carrying interest at 3 per cent., B stock carrying interest at 4 per cent. Though the stock was issued to the dock companies, the Act provided that they should divide it amongst their debenture holders and shareholders. The stocks were redeemable by the Authority at their option after twenty years. The Authority was to provide out of revenue, after meeting the working expenses of the Port as defined in the Act, a sinking fund for the redemption of the stock at a period not exceeding ninety years, in accordance with regulations to be made by the Board of Trade. If the revenue was not sufficient to provide the sinking fund, the Board of Trade might require the Authority to increase their charges within certain maxima. The Port stock did not give the holders any share in the management of the undertaking of the Authority, or in the property of the Authority, except that A stock, and, subject thereto, all other Port stocks, were a charge on the Port Fund, which was composed of all the receipts of the Authority (s. 16), but which, by s. 21, was to be applied in a particular order. If the interest was in default for three months holders of Port stock of an aggregate nominal value of not less than 500,000*l.* might obtain a receiver and manager of the undertaking of the Authority. There was no provision as to what was to happen if the principal sum was not paid at the date fixed for redemption :—

Held (by Viscount Cave L.C., Viscount Finlay, Lord Atkinson and Lord Sumner; Lord Phillimore dissenting), that the transaction between the Authority and the dock companies fell within r. 3 of Part III. of Sch. IV. of the Finance (No. 2) Act, 1915, and was one of purchase of an asset for a consideration other than cash—namely, the issue of a certain amount of Port stock, which was to be valued at the time the undertakings were acquired. The stock could not be regarded as representing either (1.) unpaid purchase money under r. 1 (*a*), or (2.) borrowed money under r. 2, or (3.) a debt under r. 2 of the same Schedule.

* *Present :* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE.

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Held, therefore, that in calculating the capital of the Authority for the purposes of ascertaining, pursuant to s. 40, sub-s. 2, the pre-war standard under Sch. IV., Part III., the amount of the Port stock ought not to be deducted from the capital.

Decision of the Court of Appeal [1922] 2 K. B. 599 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Sankey J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully stated in the report of the case in the Court of Appeal and sufficiently appear from the judgment of Viscount Finlay, and they are summarized in the headnote.

1923. April 17, 19. *Sir Ernest Pollock K.C.* and *Reginald Hills* (*Sir Douglas Hogg A.-G.* with them) for the appellants. The amount of the Port Stock issued by the respondent Authority as consideration for the acquisition of the undertakings of the various London Dock Companies must be deducted from the amount of the assets of the respondent Authority for the purpose of arriving at the capital of its trade or business under the provisions of the Finance (No. 2) Act, 1915, as being either borrowed money or a debt within r. 2 of Part III. of the Fourth Schedule to that Act. Under the Port of London Act, 1908, the holders of Port stock are not members of the respondent Authority and take no part in the management of its business, but are creditors of the Authority receiving fixed rates of interest and having as security for the amount of the stock a charge on the Port Fund, and if the interest falls into arrear they may apply for the appointment of a receiver. The stock is charged on all the revenues of the Authority and is to be redeemed within a certain limited time. It is a deferred and secured debt and is in substance a kind of debenture. The fact that the statute provides a special mode of payment does not make this stock any the less a debt. The capital represented by the Port stock so issued is an asset of the stockholders who have invested it by way of loan to the respondent Authority and cannot be directly or indirectly included in the assets of the Authority

(1) [1922] 2 K. B. 599.

as defined for the purposes of Part III. of the Finance (No. 2) Act, 1915.

[They referred to *Merlimau Rubber Estates* v. *Inland Revenue Commissioners* (1), *and Boland's, Ld.* v. *Inland Revenue Commissioners.* (2)]

Sir John Simon K.C. (with him *Konstam K.C.* and *Edwardes Jones*) for the respondents. It is a fallacy to treat the respondent Authority as inheriting the debts of its predecessors. By the Port of London Act, s. 21, when once the working expenses have been paid what is left is really profits to be applied in a particular order of administration. There is no question of taking over the liabilities of the Authority's predecessors. The consideration for the purchase of the undertakings in question was the issue of the amounts of Port Stock set out in s. 3 of the Port of London Act, 1908, and there never has been any purchase money unpaid or any borrowed money or debt owing in respect of this purchase. The holder of Port stock so issued is not a person to whom the Authority owes a debt because in ninety years' time the stockholder will be entitled to claim his proportionate share (up to the amount of his holding) in the distribution of a redemption fund which is fed by the profits of the Authority, and of which the Authority is a trustee: *Mersey Docks and Harbour Board* v. *Lucas* (3); *Whittaker* v. *Kershaw* (4); *Webb* v. *Stenton.* (5) The redemption fund, against which alone the stockholders will ever have any claim for the face value of their stock, is a separate thing and does not belong to the Authority in its own right. Unpaid purchase money and borrowed money being out of the question, it cannot be said that at the present time there exists a debt between the stockholder and the Authority. Therefore r. 2 of Part III. of Sch. IV. of the Finance (No. 2) Act, 1915, does not apply and does not justify any deduction in respect of this Port stock in computing the amount of the capital of the respondent's trade or business.

Sir Ernest Pollock K.C. replied.

(1) Since reported [1923] A. C. 283.
(2) Unreported C. A. (Ir.) June 13, 1918.
(3) (1883) 8 App. Cas. 891, 906–7.
(4) (1890) 45 Ch. D. 320.
(5) (1883) 11 Q. B. D. 518, 522, 526.

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The House took time for consideration.

1923. May 4. VISCOUNT CAVE L.C. My Lords, I have had the advantage of reading the judgment about to be delivered by my noble and learned friend, Lord Finlay. I agree with his reasoning and with his conclusion.

VISCOUNT FINLAY. My Lords, the business of the Port of London Authority established by the Act of 1908 (8 Edw. 7, c. 68) is a trade or business to which the provisions of the Finance (No. 2) Act, 1915, apply in respect of excess profits duty. Under these provisions there is imposed on the amount by which the profits arising from the trade or business in any accounting period exceed by more than 200*l.* the pre-war standard of profits a duty known as the " excess profits duty " of an amount equal to 50 per cent. of that excess.

The pre-war standard of profits is taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years to be selected by the taxpayer. There is, however, a proviso that if it is shown to the satisfaction of the Commissioners that that amount is less than the percentage standard as defined by the Act, the pre-war standard of profits shall be taken to be the percentage standard. This provision is one in favour of the taxpayer inasmuch as the higher the standard the less will be the amount of excess profits on which the excess duty is to be paid. The percentage standard is to be taken to be an amount equal to the statutory percentage on the capital of the trade or business as existing at the end of the last pre-war trade year, and where, as in the present case, the business belongs to a Corporation the standard of percentage is 6 per cent.

The Fourth Schedule to the Act contains in Part III. provisions as to the ascertainment of capital. The first clause provides that the capital of a trade or business shall, so far as it does not consist of money, be taken to be, " so far as it consists of assets acquired by purchase, the price at which these assets were acquired, subject to any proper deductions

for wear and tear or replacement, or for unpaid purchase money."

The second clause provides that "any capital the income on which is not taken into account for the purposes of Part I. of this Schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of Part III. of this Act."

The third clause provides that "where any asset has been paid for otherwise than in cash, the cost price of that asset shall be taken to be the value of the consideration at the time the asset was acquired." The other provisions in this clause are not material for the purposes of the present case.

The contest in the present case is as to the amount of capital on which the percentage standard should be ascertained for the purpose of applying the foregoing provisions to the case of the Port of London Authority with reference to the excess profits duty. The percentage standard is, in the present case, an amount equal to 6 per cent. on the capital as existing at the end of the last pre-war trade year. The larger the capital, the higher will be the percentage standard, and throughout the argument the endeavour of the Inland Revenue Authorities has been to bring the capital as low as possible and the endeavour on the part of the Port Authority has been to maintain it at as high a figure as possible.

The points on which it has been urged on behalf of the Revenue that the amount of the capital should be reduced are three :—

(1.) It was urged that the assets had been acquired by purchase and that there should be a deduction in respect of unpaid purchase money under Part III. of the Fourth Schedule, para. 1 ;

(2.) It was urged that there should be a deduction for borrowed money under para. 2 ; and

(3.) It was urged that there should be a deduction in respect of debts under the same paragraph.

For the purpose of appreciating these contentions we must consider the mode in which under the Port of London Act, 1908,

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the undertaking was acquired by the Authority and the nature of the consideration.

The Act provided for the transfer to the Port Authority as from the appointed day of the undertakings of the several dock companies and the issue by the Port Authority of certain amounts of Port stock created under the Act (s. 3, sub-s. 1). The stocks so issued were to be substituted for the existing debenture and other stocks of the several dock companies (s. 3, sub-s. 2). The existing debenture and other stocks were cancelled and in lieu of them proportionate amounts of the Port stock were vested in those who had been the holders of the debenture and other stocks in the companies whose undertakings were so acquired. Authority to issue Port stock was conferred by s. 19 of the Act. This section authorized the creation of Port of London stock for the purpose of raising money which the Port Authority is authorized to borrow and for the purpose of the issue of stock required by the Act (s. 19, sub-s. 1). The Port stock is to consist of A and B stock, and, if the Port Authority so determines, of other classes ranking pari passu with B stock (s. 19, sub-s. 2). These Port stocks are charged on the Port Fund and on all the revenue of the Port Authority (s. 19, sub-s. 3). These stocks are to be issued subject to regulations of the Board of Trade, but such regulations must (*a*) authorize the holders of Port stock of an aggregate value of 500,000*l.* on which there has been default in payment of interest for three months to apply to the High Court for the appointment of receivers and managers of the undertaking; (*b*) not make A or B Port stock redeemable before twenty years from the appointed day; (*c*) require six months' notice to redeem; and (*d*) provide for half-yearly payment of interest (s. 19, sub-s. 4).

Sect. 20 of the Act provides for the creation of sinking funds for redemption within a period of ninety years from the date of the transfer of the undertaking of any dock company of any Port stock issued by the Port Authority in connection with that transfer, and makes provision for the redemption of other Port stock and repayment of loans.

Sect. 21 of the Act is as follows :—

"21. The receipts of the Port Authority on revenue account in any year shall be applied to the following purposes in the following order:—

(1.) The payment of working and establishment expenses and the cost of the maintenance of the port, and of the execution and performance of the powers and duties of the Port Authority (including amongst other things payments on account of pensions, superannuation allowances, and compensation payable to officers and servants) properly chargeable to revenue account:

(2.) The payment of interest on A port stock and any arrears thereof:

(3.) The payment of interest on other classes of port stock and any arrears thereof:

(4.) The payment of interest on any loan raised by the Port Authority otherwise than by the issue of port stock:

(5.) The payment of any sums required under this Act to be paid into any sinking or redemption fund, or otherwise towards the discharge of any capital liability:

(6.) The payment into the reserve fund created under this Act of any sums required by this Act to be paid into that fund;

and the balance, if any, shall be applicable to such purposes and in such manner, for the benefit of the port, as the Port Authority may determine."

Port stock was issued under the Act of the nominal amount of 22,362,858*l.* as consideration for the transfer, and the market value of this stock at the time the undertakings were acquired was 21,457,586*l.*

The contention of the Revenue is in substance that the effect of the statutory provisions as to excess profits duty, coupled with the provisions of the Port of London Act, 1908, is to show that the capital for the purpose of excess profits duty is nil. In my opinion, there has been a complete failure to

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establish any of the grounds on which it has been sought to support this somewhat startling conclusion.

The first ground alleged was that the value of the stock must be taken as unpaid purchase money. Unpaid purchase money presupposes a sale for a price which remains in whole or in part unpaid. In the present case, the consideration for the transfer was the issue of the Port stock with the incidents which I have described. This stock was issued and accepted in satisfaction of the price. Nothing except interest on the stock was to be paid until the period for redemption should have expired. There was no purchase money, and it follows that no deduction in respect of unpaid purchase money is possible. The stock was taken in payment.

The second ground urged by the appellants was that the amount of the stock must be taken to have been money borrowed by the Port Authority from the holders of the stock in respect of which they paid interest. When in the second paragraph of Part III. of the Fourth Schedule "borrowed money" is spoken of, what is referred to is a real borrowing and a real lending. Here there was nothing of the kind. All that can be said is that the issue of the stock as the consideration for the purchase was attended with incidents in some respects similar to those which would have ensued if there had been a borrowing. It is impossible to construe in this way any Act of Parliament, and more particularly a taxing Act. To bring the provision as to borrowed money into operation there must be a real loan and a real borrowing. The suggested construction would involve putting upon a taxing Act a strained meaning which its words do not bear.

There remains for consideration the third ground suggested by the appellants for reduction—namely, that the amount of the stock falls under the category of "debts" mentioned as a subject of deduction in para. 2 of Part III. of the Schedule. The argument for the appellants appears to treat the word "debts" as equivalent to "liabilities." Liability there is on the part of the Port Authority, but it is of a very special nature and very different from the liability to pay a debt. The Port Authority are not bound to make any payment

except in respect of the interest as it becomes due from time to time on the stock. As regards any capital amount, that is to be secured by the machinery of a sinking fund subject to the very special regulations to which I have referred. " Debts " in this passage denotes debts in the ordinary course and not such a special form of liability as is created by the Act.

In my opinion the judgment of the Court of Appeal is right, and the present appeal should be dismissed with costs.

LORD ATKINSON. My Lords, it is frankly stated in the case of the appellants, that this appeal relates to the method prescribed by statute for ascertaining, for the purpose of excess profits duty, the capital of the trade or business of the respondents, in order to arrive at the applicable pre-war standard of profit under s. 40, sub-s. 2, of the Finance (No. 2) Act, 1915, and Part III. of the Fourth Schedule of that Act. The issue which arises for decision is accordingly alleged, in effect, to be whether under the provisions of this Part III., the value of the Port stock issued by the respondents under the Port of London Act, 1908, as consideration for the transfer to them of the undertakings of the several dock companies therein mentioned, should, for the purpose of the excess profits duty, be taken to be the capital of the trade or business of the respondent Authority which should be deducted from its assets. The measures prescribed by those statutes for the purpose of ascertaining the amount of this capital and of those assets are of a rather artificial and conventional character, and the results arrived at are naturally of the same character. But I think the words of the statute and the Schedules thereto must, in the absence of anything indicating a contrary intention, be construed in their natural and ordinary meaning, business terms, when employed, receiving the meaning they bear in business transactions resembling those in which they have been, in fact, used. The relevant provisions of the statutes of 1908 and 1915 and the Schedules attached have been analysed by my noble and learned friend who has preceded me. I concur in the conclusions at which he has arrived, and I wish to avoid needless and unhelpful repetition. I

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desire, however, to lay stress upon the consideration that the debts due or obligation owed by the several dock companies absorbed by the respondents to the holders of their debenture or other stock are not in any way transferred to the respondents. This is clear from the provisions of the Second Schedule of the Act of 1908. On the contrary, holders of the debenture and other stock of the absorbed dock companies, a name I use for convenience, must deliver up the certificates for those stocks to be cancelled before they can receive in substitution the Port stock of the respondents.

Again, the Port stock, though issued to the former dock companies as the consideration for the transfer to the respondents of their respective undertakings, does not become assets of the former companies to be disposed of as these companies may deem fit. The absorbed companies receive this stock under a statutory obligation to distribute it amongst their own stockholders according to the scales mentioned in Sch. 2 of the Act of 1908. It is clear, therefore, that the only obligation towards the holders of the substituted Port stock owed by the respondents to them is that which springs from the ownership of this stock, and that alone. This stock bears interest. Its owners are, of course, entitled to be paid that interest. The mode of enforcing payment, if it be not paid, will be presently considered, but the question decisive of this appeal is whether the relation between the respondents and the stockholders, created by the ownership of the Port stock issued to the latter, is that of debtor and creditor, or not; does the obligation resting upon the respondents by reason of this ownership at all resemble the obligation which a borrower of money owes to the lender of it? Is the obligation a debt to the amount of the face value of this Port stock within the meaning of Part III., sub-s. 2, of the Fourth Schedule of the Finance Act (No. 2) of 1915?

The subject matter with which this Part III. deals is the amount of the capital of a trade or business so far as that capital does not consist of money. It provides that so far as it consists of assets acquired by purchase, the price at which

they were acquired is the amount, with proper deductions for wear and tear, and for unpaid purchase money. This latter because, of course, the value of assets is to the owner diminished in every just sense by the amount of this unpaid purchase money. If the market in which the assets were purchased should be a falling market, the assets might be saleable at a price much less than the price at which they were originally purchased, and the owner's capital might be reduced in effect to a cypher or a minus quantity. The same result would follow if the price for which the assets were purchased was paid; but paid by money borrowed by the purchaser from a third party and still left unpaid. To arrive at a result just to the owner in this latter case, the amount of this borrowed money should be deducted in computing the amount of the taxpayer's capital just as fairly as the unpaid purchase money is deducted. This just result is brought about by the express provision of sub-s. 3 of Part III.

The sub-section brings debts within the equitable principle applied to borrowed money and expressly provides that they are to be similarly excluded. It does not give any definition or description of these debts, or contain any suggestion as to how they are or must be created. They must, of course, be debts of the owner whose capital is to be ascertained, and having regard to the context in which the word occurs it is but reasonable to hold that they must involve an obligation upon the owner similar to that resting upon him in respect of borrowed money, or on unpaid purchase money, in order to be brought within the equitable principle applied in these latter cases. A purchaser is bound in law to pay the purchase money of goods he purchases. He may also be bound in certain circumstances to pay interest upon this sum while it remains unpaid. He may be sued for the recovery of it. His property may be taken in execution, seized and sold to satisfy a judgment recovered in respect of it. If the purchaser be an individual he may, in most cases, be made a bankrupt in the event of non-payment. If a company it may in certain circumstances be wound up, or equitable execution in the shape of the appointment

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of a receiver be obtained. It does not appear to me that an obligation for the breach of which or the non-performance of which no relief of any of these kinds can be obtained is an obligation at all similar in kind or character to the obligation which rests upon a purchaser of goods to pay the price of them, or upon the borrowers of money to repay the loan, nor is it an obligation amounting to a debt within the meaning of that word in its ordinary natural sense and meaning as used by business men in their commercial or business dealings.

I quite concur with the Court of Appeal in thinking that the transaction authorized by the statute of 1908 was, if a purchase at all of the assets of the absorbed companies, a purchase to be paid for otherwise than by cash. That consideration was in the present case Port stock, which had been issued as required by the statute, accepted by the dock companies, and distributed amongst their stockholders. No portion of this consideration remains unpaid, and the case cannot therefore come within Part III., sub-s. 1, of the Fourth Schedule of the Act of 1915.

I also concur with the Court of Appeal in the opinion that the transaction was not one carried out to any extent by borrowed money. The old dock companies, the absorbed companies, transferred their respective undertakings in consideration of Port stock issued to them by the respondents, and those companies distributed this stock amongst their own stockholders according to certain authorized scales. This stock was taken in substitution for the stock they formerly held, on the certificates for the latter being cancelled. No money passed directly or indirectly between the parties to the transaction ; neither did any party borrow money or lend it.

The remaining question is whether this Port stock constitutes a debt due by the taxpayer, the respondents, to the stockholders within the meaning of sub-s. 2 of Part III. of the Fourth Schedule to the Act of 1915, which must be deducted from the amount of the capital of the respondents.

It is obvious that, if the amount of the Port stock be a debt at all, it cannot be a debt due to the absorbed companies. They never held the stock issued to them as assets with which

they could deal in any way they pleased for their own purposes. They were bound in performance of their statutory duty to distribute it amongst their own stockholders, who took it in substitution for the stock they previously held. There is no provision in these statutes or either of them for winding up the Port of London Authority. It is not contemplated that it should be wound up, and the stockholders have no right to redemption of the stock they may hold upon any terms other than those expressly provided in the statutes. By s. 16 of the Act of 1908 a Port Fund is established into which all the receipts of the Port Authority are to be carried, and out of which all the payments by the Port Authority are to be made. The payment of the interest on and the redemption of this Port Stock is, if made at all, to be made out of this fund, which, if necessary, can be augmented.

By ss. 17 and 19, sub-s. 3, the A Port stock and the interest thereon, and subject thereto all other Port stock and the interest thereon, are charged upon the Port Fund, and all the revenues of the Port Authority, and all its receipts, are to be paid into this Port Fund. This is, in effect, the same as charging the A and B stock on this fund alone. By s. 20 a redemption fund is to be created out of which the Port Authority may, under regulations made by the Board of Trade, make provision for the redemption of the Port stock issued in consideration of the transfer of the several dock undertakings within ninety years from the date of the transfer. The Port Fund, however, is the only fund out of which the holders of A and B stock have a claim to be paid, and the only enactment providing a method of enforcing this claim is that to be found in the proviso to s. 19, where it is enacted that the whole of Port stockholders of any class or classes of an aggregate value of not less than 500,000*l.* may in respect of default of the payment of interest for a period of three months apply for the appointment of one or more receivers and managers of the revenues, property and undertakings of the Port Authority, but this regulation is not designed to make the Port stock A or B redeemable before the expiration of twenty years from the appointed day.

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As to the individual stockholder, no right of action against the Port of London Authority would appear to be conferred upon him even after the expiration of ninety years to enable him to get judgment against them for the amount of his security or the interest due upon it. These rights are so entirely different from those which an ordinary creditor would have against an individual or company owing him money that, in my opinion, it cannot be held that the obligation imposed upon the Port Authority by the issue and acceptance of this Port stock towards any one of those who have accepted it as a substitute for the stock they gave up to be cancelled is a debt within the meaning of Sch. 4, Part III., sub-s. 2.

I think, therefore, the decision appealed from was right and should be affirmed, and that the appeal should be dismissed with costs.

LORD SUMNER. My Lords, the only point is whether the liability of the Port of London Authority on its "Port Stock" is a "debt" within the Fourth Schedule, Part III., para. 2, of 5 & 6 Geo. 5, c. 89. It is not unpaid purchase money, for there was no purchase money. It is not borrowed money, for there was no borrowing by the Port of London Authority and if, by an unlicensed stretch of the imagination, a purchase on credit is a purchase, in which the buyer pays to the seller cash on delivery, which he has borrowed from the seller himself for that purpose, the holders of the Port stock, at any rate, sold nothing and therefore did not even fictionally lend anything.

Whether this Port stock is more like preference shares or debentures I do not stop to inquire, for with some points of resemblance to both it certainly is neither. It is the creation of the statute, 8 Edw. 7, c. 68, although no doubt negotiations had been carried through before that statute was introduced, and it is best described as a "capital liability." Sect. 21, which prescribes the order in which the receipts of the Port of London Authority shall be applied, distinguishes between "expenses chargeable to revenue account," among which debts ordinarily so-called would be included, and provisions

for interest and for redemption funds and for the discharge of any "capital liability," in which category it clearly is that this Port stock must fall. It may be said popularly that the Authority "owe" this money and will ultimately have to pay it so far as the Port Fund will go, a fund which they have to provide for the purpose. It may be—though I express no opinion about it—that debt would lie for principal and interest when payment fell due, at any rate as soon as the condition precedent had been satisfied, which consists in providing sufficient funds. It is true that stock issued for money borrowed would rank pari passu with this stock, issued in substitution for encumbrances on the old companies' undertakings. None of these circumstances, however, carry matters much further.

The Fourth Schedule to the Finance (No. 2) Act, 1915, is framed for the purpose of providing practical rules, precise and peremptory, for computing the pre-war capital of chargeable undertakings. It is, in substance, a series of directions, not necessarily exhaustive, for preparing a balance sheet of assets and liabilities. It is a strictly business document, and as, by means of it, the Inland Revenue obtains the computations under which it takes tax, the Schedule must be read strictly and not so as to give the Crown anything more than it clearly says. It contemplates an assets side and a liabilities side and the balance struck gives a capital, arbitrarily ascertained it may be, but at any rate arrived at readily in a time of emergency and pressure.

The three paragraphs into which Part III. is divided are somewhat awkwardly arranged. They deal with capital which consists of money, and with capital which does not. Para. 3 is, I think, to be read with para. 1, and might well have formed a sub-paragraph to it; para. 2 appears to be principally, though it may be not entirely, concerned with money. In para. 1 assets not consisting of money are, for the purpose of the amount of the trade capital which they constitute, to be taken, when they have been acquired by purchase, at the price of acquisition, less wear and tear or replacement costs and unpaid purchase money, if any. This

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price is evidently a price payable in money, and by para. 3, when any asset has been paid for (and I suppose contracted for) otherwise than in cash, the cost price, that is, the equivalent of the money price when purchases are made for a money price, shall be taken to be the value of the consideration at the time the asset was acquired. In this case nothing is said about deduction for wear and tear or replacement. Apparently, as unpaid purchase money cannot apply to this case and nothing is said about any unexecuted part of the non-monetary consideration, which would correspond to unpaid purchase money, deductions for wear and tear will not apply either, but it seems to be unnecessary to express any concluded opinion as to this. It is also unnecessary to express such an opinion on the question whether the present case falls within para. 3 at all, since, although the issue of this Port stock may well be a consideration otherwise than in cash, it is difficult to see how it can be payment for the assets—namely, the whole Docks' undertaking, material or immaterial—since they were not bought from the stockholders and the stock was not a payment to the stockholders. This, however, does not matter except to show that the whole Schedule is more ambiguous than it appears to be at first sight, for it is on para. 2 that the question turns.

In that paragraph deductions are prescribed under two categories: capital, the income of which is not taken into account for the purposes of Part I., and borrowed money or debts, which, being in antithesis, ought prima facie to be such as are not capital. The object of the whole of this Part is to enable the value of the capital to be fixed. Either deduction means the arithmetical mode of excluding from the capital something that is not capital, i.e., such borrowed money or debts other than borrowed money as do not constitute capital in the business in question, or the whole paragraph is a declaration that, for the purposes of this tax, certain things, to the extent of the certain liabilities due against them, shall not be treated as capital, even though they really are such. Of course, money may be capital none the less that it is borrowed money, for it is capital or not according to its

employment, not according to its origin or obligations. In the former event this Port stock is not touched by the paragraph, for it does not represent borrowed money of the Port of London Authority, and, so far as it is a debt, it is not part of their capital, which consists of the undertaking and its assets and not of its liabilities. If again "debt" is here nomen generalissimum the reference to borrowed money is otiose, since then it would be included and deducted under the word "debts." In the latter event I think the words are, to say the least of them, more apt to describe trade debts—debts for purchases and for services rendered and for taxes—than contingent capital liabilities like the original issue of Port stock. When "debt" is mentioned in Part III. elsewhere than in para. 2, namely in para. 1 (*b*), the debts are expressed to be "debts due to the business." I think this points to the meaning of "debts" in para. 2 also being debts due by the business, that is trading debts, and its collocation with borrowed money points in my opinion in the same direction. The Schedule is at any rate not so expressed as to entitle the Inland Revenue with reasonable clearness to deduct the amount of this Port stock to the prejudice of the taxpayer.

My Lords, how would the appellants' construction work out in actual fact here? On their argument the so-called "debt" to be deducted is the value of the Port stock originally issued, which cannot be payable for twenty and may not be payable for ninety years from the date of issue. We have nothing to do in this connection with the value of the interest payable meantime, for that is no part of the "debt" in question repayable after that interval. The present value of the sum, which will be ultimately payable, if certain conditions precedent have been fulfilled, is by no means the same as the value of the consideration at the time when the assets were acquired, since that consideration includes the right to receive and the prospect of receiving interest in the meantime as well. Accordingly, the claim is to deduct something different from and greater than any "debt" that can ever be due on redemption of the stock. I will not stop to consider whether the "value of the consideration"

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is the face value or the market value at the date of issue of the stock originally issued. In the former case, there is no sense in deducting it from itself and so extinguishing a capital which, in the shape of the material assets, the Port of London Authority owns and in fact employs in its business as capital; in the latter, there is to be a deduction of an amount, which must at least differ from any "debt" payable on redemption by the proportion of the market value attributable to the right to receive interest. It may perfectly well be, that the Port of London Authority would in the eye of the Inland Revenue for the purpose of excess profits duty have no capital at all, until it had traded with some capital so successfully as to redeem this stock about the end of the present century, and then would, for the first time, suddenly become possessed of capital in the shape of docks and warehouses ninety years old and more, which when they were of less antiquity had been a capital without value. For the purpose of income tax, however, the Inland Revenue would all the time have been collecting duty on annual profits or gains arising from a trade, which cannot be and is not carried on without capital and capital of some considerable value. I think this reductio ad absurdum confirms the view, that either the word "debts" does not and cannot mean the Port stock, or that, if it can, it does so only ambiguously and as the least reasonable of all the possible meanings, and so does not provide the authority requisite to justify what the Inland Revenue claims to do.

LORD PHILLIMORE (read by LORD SUMNER). My Lords, as I have the misfortune to differ from the rest of your Lordships, I had better express my reasons for doing so shortly.

I conceive the scheme of the provisions in the Finance Act of 1915 imposing the excess profits duty to have been as follows: There are a certain number of traders, some incorporated, some not, who in unusual circumstances have made unusual profits. After allowing a small margin to avoid petty claims, they should be made to pay half the excess of their profits over the normal, by way of duty. But there

may be some traders who in times past have made little or no profit, and they are not to be assessed on their increased profits until such increase exceeds a percentage on the capital, 6 per cent. in the case of incorporated bodies, 7 per cent. in the case of individual traders. Then comes the question, what is the capital on which the percentage is to be calculated? I should have thought that it would have been better to have left that to be determined in each case as a matter of fact by the Commissioners of Income Tax. It is a matter which men of business can as a rule easily determine.

But the Act proceeds to establish certain criteria which are arbitrary, not perhaps sufficiently carefully expressed, and certainly difficult of application to the peculiar circumstances of the case now before your Lordships. This capital is to be what may be called the positive capital, less unpaid purchase money, borrowed moneys and debts.

The Port of London Authority was created by statute in 1908, and there were vested in it by the statute all the docks, wharves, warehouses and other property of the three London dock companies. The Authority was to pay nothing for them: it started with no money with which to pay: but it was not a second William the Conqueror, and it did not take all this property by way of confiscation or accept it as a gift. It had to create two kinds of Port stock—A and B—one bearing interest at 3 per cent. and the other at 4 per cent., and blocks of this stock were to be assigned either through the companies, or directly upon their indication, to every debenture holder or shareholder in the dock companies according to the value in the market of each of their respective former holdings. And this Port stock, increased by some later creation to meet other obligations of the Authority, was in existence and bore interest at the date when the assessment for excess profits duty had to be made, in 1915 and also in 1916—the two years of taxation which are in question in this case.

Now in arriving at the capital of the Authority, your Lordships should start with what I should call the positive capital—the docks, wharves, warehouses and other property

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originally taken over by the Authority and accretions since. The Authority says that the matter stopped here, and that this is its capital. The income upon it has not reached 6 per cent., though, as I gather, it was not very far off it, and therefore (says the Authority) there are no excess profits upon which it is to pay duty. The Crown says that you have to go further and deduct the Port stock from the capital. I should perhaps add that the Authority might be prepared if it were of importance to admit that such Port stock as has been issued in later times to represent borrowed money might be deducted; but the figures render it unnecessary to consider this point.

Now, if no deduction is to be made in respect of the Port stock issued by the Authority to the former holders in the dock companies, the Authority is treated as if it had acquired this capital for nothing, as it were, by way of confiscation. Can this be right? It is said that the particular liability is neither unpaid purchase money nor borrowed moneys nor debt, and that it must come under one of the three if it is to be taken as a deduction from capital. I agree with the Court of Appeal that it is not unpaid purchase money or borrowed moneys, but I stick at the word "debt."

It is said that it is not a debt because no action at law can be brought against the Port Authority to compel payment. No doubt this is one of the most important incidents of a debt; but it is not, I think, absolutely necessary to the existence of a debt, and it is not to be forgotten that it is usual for corporate bodies established for purposes of public utility to have some special protection against creditors. The debenture holder in a railway company is unquestionably a creditor, but he cannot get the sheriff to sell the undertaking.

It is further observed that the debt, if it be one, is not due in præsenti. My Lords, with regard to this and the previous contention, I would venture to say that they do not tend so much to negation as to valuation of the debt. They are reasons for valuing it down in a manner which I shall describe later on.

On the other hand, interest is to be paid on this stock: it may be redeemed at any time, it must be redeemed if there

are sufficient assets at some time, it is described as a capital liability, and if interest is in arrears, and holders of a sufficient quantity of stock agree to sue, they can get a receiver appointed. This Port stock is in the same position as Port stock which may be created under the borrowing powers given by the Act to discharge either liabilities of the original dock companies or expenditure of its own ; and remarkably enough the payment of interest upon it ranks in front of interest on other classes of Port stock and of interest on any loan raised in any other manner, except in so far as the Board of Trade may direct that such interest should be paid pari passu. These circumstances have led me to the conclusion that this liability should constitute a debt, and thereby a deduction from capital within the meaning of Part III. of the Fourth Schedule of the second Finance Act of 1915.

But if this deduction were made, it should not be to the extent of the face value of the Port stock. A security which cannot be called in for many years and meanwhile only bears interest at the rate of 3 per cent., was not in the years 1915 and 1916 worth, I should presume, more than 50 per cent. of its face value ; and a 4 per cent. security would only be proportionately better. This is, I think, the measure of the debt which should be deducted from the capital for the purposes of arriving at a statutory percentage.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 4, 1923.

Solicitor for the appellants : *Solicitor of Inland Revenue.*
Solicitors for the respondents : *E. F. Turner & Sons.*

[HOUSE OF LORDS.]

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KRAMER . . . . . APPELLANT;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Alien Enemy—Dual Nationality—German National also British Subject—Statutory Charge on Property in England—Treaty of Peace Order, 1919, *s.* 1 (*xvi.*).

A person who is at the same time a British subject and a German subject is a German national within the meaning of the Treaty of Peace Order, s. 1 (xvi.), which charges all property, rights and interests within His Majesty's Dominions belonging to German nationals at the date when the Treaty of Versailles came into force with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in German territory.

Order of the Court of Appeal [1922] 2 Ch. 850 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Astbury J.

The question raised by the appeal was whether the appellant, who was both a British subject and a German subject, was a German national within the meaning of s. 1, clause xvi., of the Treaty of Peace Order, 1919, so that his property, rights and interests situate in the United Kingdom on January 10, 1920, the date when the Treaty of Versailles came into force, were subject to the charge imposed by that Order.

"The following statement of facts is taken from the judgment of Younger L.J. (2):—

"The appellant here was born at West Hartlepool on January 19, 1867. The nationality of his father was at birth German. In 1867 the father was in business at Hartlepool. Whether or not he had then lost his original German nationality is not agreed between the parties. What is agreed is that in 1869 the appellant's father, having returned to Germany, obtained a grant, or regrant, of German nationality for himself and his infant children, including the appellant,

* *Present:* VISCOUNT CAVE L.C., EARL OF BIRKENHEAD, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

(1) [1922] 2 Ch. 850. (2) [1922] 2 Ch. 873.

who was educated in Germany, and was, on completion of his education, required to serve, and did serve, in the German army for one year, commencing April 1, 1888. At the close of his military service the appellant left Hamburg for Siam, where he took up his residence. Being informed by the German officials at Bangkok that he would be required to enter his name in the register of the German Consulate there on pain of being treated as a deserter from the German army and sent back to Germany under arrest on the next available man-of-war, the appellant caused his name to be entered in the German Consulate register at Bangkok, and he received a document recording his registration. In 1917 when Siam declared war against Germany he was arrested by the Siamese authorities as a registered German national, and was deported to India, and interned there. Towards the end of 1919 he was taken by the British authorities on a British vessel and landed in Germany.

"The appellant, who on January 10, 1920, had property in the United Kingdom, brought an action against the respondent in the Chancery Division claiming a declaration that his property, rights and interests within His Majesty's Dominions on the date in question were not subject to any charge under the Treaty of Peace with Germany or the Treaty of Peace Order, 1919."

Astbury J. dismissed the action on the authority of *In re Chamberlain's Settlement* (1), and his judgment was affirmed by the Court of Appeal by a majority (Lord Sterndale M.R. and Warrington L.J.; Younger L.J. dissenting).

1923. March 15, 19. *Sir John Simon K.C.* and *Whinney* for the appellant. The Treaty of Peace Order, 1919, was made pursuant to the Treaty of Peace Act, 1919, which was passed to give effect to the Treaty of Versailles, and that Treaty does not contemplate adverse dealing with the property of a British subject (which the appellant is). There is nothing either in the Act of Parliament or in the Order in Council which deprives a British subject of his right to his own

(1) [1921] 2 Ch. 533.

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property in Britain. The appellant could not have been interned as a British subject. During the war the English law would treat him as having all the rights and duties, including that of serving with the forces, of a British subject. In order to ascertain the ambit of the Order in Council see what it effects. It effects a charge on the assets of German nationals in this country at the time of the coming into force of the Treaty of Peace. It is unthinkable that the German Government should concede a charge on the property of a British subject in England. The appellant cannot be regarded as a German national here in Britain because he is a British subject and is entitled to the protection of the British law. The Order in Council incorporates certain sections of Part X. of the Treaty of Versailles, including s. IV., which provides, by art. 297, that "the question of private property rights and interests in an enemy country" shall be settled according to the principles laid down in that section and to the provisions of the annex thereto. That has no application to the property which is the subject of this appeal, because this property of the appellant's is not lying in an enemy country but is lying in his own country. On the true construction of the Order the charge conferred by Germany by way of concession cannot be a charge on property which Great Britain treats as the property of a British national. Apart from the Treaty the private property of a subject of a defeated enemy at the end of the war would not be confiscated but would be returned to him. The effect of the Treaty is that Germany surrenders that right. In Britain and in respect of this property the appellant is not a German subject but a British subject, and he could have brought an action to recover his property even during the war. In view of his being a British subject it would have been impossible for Germany to deal with his property in this country on the footing that he was a German subject. As a British subject he is entitled not to have his property interfered with except in the course of law. No doubt there might be an Act of Parliament depriving him of that right, but that could only be effected by very clear language. A man owing a divided allegiance is not half a

subject of one State and half of another, but is completely a subject of each State. On the date of the ratification of the Treaty the appellant was a German national in Germany, and by German law a German national only, and he was at the same time a British subject in England, and by English law a British subject only. For the purposes of the matter in hand he is not a German national at all. Younger L.J.'s dissentient judgment expresses the appellant's argument. The decision of this case is not necessarily governed by the considerations applicable to a sujet-mixte where Great Britain is not one of the two States.

[They referred to *Hein* v. *Hildesheimer Bank* (1); *Attorney-General* v. *Wilts United Dairies* (2); Naturalization Act, 1870 (33 & 34 Vict. c. 14), ss. 4, 6.]

Sir Ernest Pollock K.C. and *Gavin Simonds* for the respondent. The question who is a German national must be determined by German municipal law: *Stoeck* v. *Public Trustee* (3), and by the law of Germany the appellant was on January 10, 1920, a German national. A person who is a German national according to the law of Germany is a German national for the purposes of s. 1 (xvi.) of the Treaty of Peace Order, 1919. For the purpose of construing the Treaty of Versailles it is irrelevant whether a person who is a German national is according to the law of another State a national of that State also: see *The Ann.* (4) There are many articles of the Treaty in which the term "German national" must include persons who are also nationals of other States: see arts. 36 and 37. Nor can any valid distinction be drawn between a person who is of German and of, say, Dutch nationality, and a person who is of German and of British nationality. It is not open to a person who by remaining a German national has asserted his allegiance to Germany and claimed her protection to contend that he is any other than a German national in proceedings in which rights of the British Government to retain and liquidate the property of

(1) Recueil des Décisions des Tribunaux Arbitraux Mixtes, 1922, Part 14, p. 71.

(2) (1922) 38 Times L. R. 781.

(3) [1921] 2 Ch. 67, 78.

(4) (1813) 1 Dod. 221.

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German nationals are in question. It is said that for the purposes of British law the appellant is a British subject, but it is not true in fact that he owes no other allegiance. Just as a person whose whole life has been a negation of his allegiance to the King cannot claim the protection which is the correlation of the duty of allegiance, so also a person whose whole life has been an assertion of his allegiance to Germany, although he has taken no steps to rid himself of his British allegiance, can have no claim to protection in this country.

[They also referred to *Porter* v. *Freudenberg*. (1)]

Sir John Simon K.C. in reply. This question falls to be determined as a matter of construction, and cannot depend upon the merits of the individual case.

The House took time for consideration.

1923. May 4. VISCOUNT CAVE L.C. My Lords, this appeal raises a question as to the construction and effect of the Treaty of Peace Order, 1919, which was made under the authority of the Treaty of Peace Act, 1919, and which, by that Act, is to have effect as if enacted in the Act. By clause 1 (para. xvi.) of the Order, it was declared that all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty of Versailles came into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, were thereby charged with payment of the amounts due in respect of claims by British nationals with regard to their property, rights, interests or debts in Germany, Austria-Hungary, Bulgaria and Turkey. There was added to the paragraph a proviso which (as amended by the Treaty of Peace Amendment Order, 1920) provided that any particular property, rights or interests so charged might at any time be released by the custodian acting under the general direction of the Board of Trade from the charge so created. The

(1) [1915] 1 K. B. 857.

appellant brought his action for a declaration that his property, rights and interests within His Majesty's Dominions on January 10, 1920 (the date when the Treaty came into force), were not subject to the above charge. His action was dismissed by Astbury J., and by the Court of Appeal, and thereupon this appeal was brought.

The facts relating to the appellant's nationality are admitted, and are conveniently stated in the judgment of Younger L.J. in the Court of Appeal as follows: [His Lordship quoted the passage already set out in the statement.] From this statement it is plain that the appellant, having been born in England, acquired at birth and had not since lost the status of a British subject. It is also plain that he acquired German nationality at the age of two years, and thenceforth was by residence, education, military service, and registration, a German national. In short, he is a person of dual nationality, or (in the French phrase) a "sujet mixte"; and the question is whether he is thereby entitled to have his property in England exempted from the operation of clause 1 (xvi.) of the Order.

The arguments put forward in favour of his being entitled to such exemption may be divided into two heads. First, it is pointed out that the Treaty of Peace Act, 1919, was passed (as appeared from its terms) to give effect to the Treaty of Versailles, and the Treaty of Peace Order, 1919, was in like manner based upon the Treaty, and provided that certain sections of the Treaty (including art. 297 and its annex) should have full force and effect as law; and it is argued (in my opinion rightly) that reference may be made to the Treaty to ascertain the true construction of the Order.

Now, art. 297 is introduced by the words:

"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section [i.e., s. IV. of Part X. of the Treaty] and to the provisions of the Annex hereto."

And the same article includes the following provisions, which are material:—

"(b) Subject to any contrary stipulations which may be

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provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

"German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph."

"(i.) Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

The annex referred to in art. 297 contains the following clause, upon which clause 1 (xvi.) of the Treaty of Peace Order, 1919, was evidently based :—

"4. All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or, if no such appointment is made by him, by an arbitrator appointed by the Mixed

Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights, and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

Founding upon these provisions of the Treaty, counsel for the appellant contended that they showed an intention to exclude from the operation of art. 297, and particularly from the operation of clause 4 of the annex to that article, the property of a German national who is also a national of the country where that property is situate. It is not denied that the expression "German national" may for some purposes include a person of dual nationality, or that (for instance) the property in England of a German national may be liable to the charge created by the Order even though he may also be a subject of another enemy power (such as Austria-Hungary) or of a neutral power (such as Sweden) or of an Allied Power other than Great Britain. But it is said that the reference in the introductory words of art. 297 to property "in an enemy country," and the contrast in clause 4 of the annex to that article of the property of German nationals within the territory of an Allied Power with the claims of nationals of that Allied Power, show that the expression "German national" must be read as impliedly excluding a German national who is also a subject of the Power in which his property is found. I cannot accede to this argument. It would be strange if Germany, in agreeing to a charge on the property of its own nationals situate in the territories of the Allied Powers, had stipulated for an exception in favour of those persons who are also subjects of those Powers; and I should be slow to read such an exception into the Treaty in the absence of some clear indication of an intention to that effect. I can find no such indication in the clause quoted. Art. 297 deals both with the property in Germany of Allied nationals and with the property in England of German nationals; and the words "property, rights and interests in an enemy country," on

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which so much reliance is placed by counsel for the appellant, serve only to label the country as being a country opposed to that of which the person concerned is a national. The word " enemy " refers to enmity between country and country and not between country and individual. Nor can I draw from the distinction in clause 4 of the annex between German and Allied nationals an inference that a person of mixed German and Allied nationality is to be altogether excluded from the operation of that clause, even as regards his property in one of the countries of which he is a subject. The express provision (quoted above) in art. 297 that German nationals who acquired ipso facto the nationality of an Allied Power under the provisions of the Treaty would not be considered as German nationals within the meaning of para. (*b*) of the article, a provision which clearly relates to those inhabitants of the territories of Eupen and Malmédy and of Alsace-Lorraine who, under arts. 36 and 79 of the Treaty, were to become nationals of Belgium or France, shows that the framers of the Treaty had in mind the question of dual nationality and had no intention of giving exemption to the " sujet mixte." In my opinion no inference can safely be drawn from the Treaty that the expression " German nationals " is to be limited either to persons who are of German nationality and no other or to persons who, being of German nationality, are not also subjects of the Allied country where their property is found.

But, secondly, counsel for the appellant contended that, whatever may be the meaning of the Treaty, the Treaty of Peace Order, which is part of our municipal law, does not apply to the property of a British subject who is also a German national. In this connection I pass by the more general arguments founded on Magna Charta, or on the rule against taxing the property of British subjects without clear words. The rights of British subjects under Magna Charta may be and constantly are modified by British statute, and the actual charging words in the Order are very clear. The argument for the appellant under this head substantially depends on the contention (put forward in the appellant's case on this

appeal) that within the realm the appellant is not and cannot be considered or treated as a German national or otherwise than as a British subject. This contention was forcibly stated by Younger L.J. in his dissenting judgment in the Court of Appeal (1) where, founding himself on such cases as *Ex parte Freyberger* (2) and *Stoeck* v. *Public Trustee* (3), he held that "a person cannot at once be a British subject and a German national," and that "in this country and for such a purpose the two descriptions are mutually exclusive." The Order was, said the learned Lord Justice, "the equivalent of a British statutory enactment. In such an enactment, and in such a context, the appellant in my judgment cannot be regarded, on construction, as a German national for the simple reason that he is a British subject." With great deference to the opinion of the learned Lord Justice I think that so to hold would be to shut one's eyes to the facts and to the whole purpose of the Order which has to be construed. Both in the Treaty of Peace and in the Order the expression "German national" means a person who is by German law a subject of Germany; and in considering whether a person is affected by the Order, it is impossible to avoid an investigation of his nationality according to German law. Foreign nationality has been long recognized by our law as having certain legal consequences in this country, and the same may be said of dual nationality; and if it be established —as here it is established—that the appellant is in fact by German law a German national, it would hardly be consistent with the scheme or language of the Order to banish that fact from our minds. The appellant is a German national, none the less because he is a British subject; and if so, he falls within the express provision of clause 1 (xvi.) of the Order, and must be dealt with accordingly.

Reference was made by Younger L.J. to the exception from clause 1 (xvi.) of the Order of property acquired under a general licence issued by or on behalf of His Majesty; and he expressed the opinion that it could not have been intended

(1) [1922] 2 Ch. 878, 883. (2) [1917] 2 K. B. 129, 133.
(3) [1921] 2 Ch. 67.

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that a German national holding property under a licence should be in a better position in respect of it than a German national who was also a British subject enjoying his property as part of his birthright. But it was explained to your Lordships that the general licence here referred to is the general licence issued on behalf of His Majesty on July 12, 1919, authorizing all persons in the United Kingdom to trade with persons resident or carrying on business in Germany; and it seems clear that the object of the exception was to avoid depriving Germans who under that licence might transact business with persons resident in the United Kingdom of the property and credits so acquired. Such a saving, which was necessary in order to prevent the Order from nullifying the licence to trade, is in no way inconsistent with an intention to subject to a charge property in England acquired before the conclusion of peace.

It was suggested that if the charge attached to the property of the appellant, who is predominantly a German though with a scintilla of British nationality, it would also attach to the property of a man of mixed British and German nationality who might have resided in England during the greater part of his life and might have fought for this country in the war. This may be so, but in that case there would be no question as to exercising in his favour the dispensing power given by the proviso to clause 1 (xvi.) of the Order; and I do not think that the theoretical possibility of a harsh application of the Order, which in practice could and undoubtedly would be avoided, should interfere with its application in other cases which clearly fall within its terms.

In my opinion the appellant's contention fails and this appeal should be dismissed, and I move your Lordships accordingly.

My Lords, my noble and learned friends, Lord Birkenhead and Lord Carson, desire me to say that they concur in this decision.

LORD SHAW OF DUNFERMLINE (read by LORD DUNEDIN). My Lords, in this case I was much moved by the powerful

dissent of Younger L.J., and I entertained serious doubts as to the judgment of the majority of the learned Lords Justices in the Court of Appeal.

Further reflection, and in particular a study of the judgment of my noble and learned friend on the Woolsack, have largely dispelled those doubts, and I concur in omnibus with the Lord Chancellor's opinion.

LORD SUMNER. My Lords, the question in this appeal is wholly one of the construction of statutory words, for although they are found in an Order in Council and are taken from the Treaty of Versailles, that Order in Council was itself made under the authority of an Act of Parliament, which gave it the force of law.

The appellant is admitted in fact to have been a German national on the day when the Treaty came into force and he has brought the present action to have it declared, with respect to property within the realm then belonging to him, that it is not subject to any charge by virtue of the Order in Council. As the words of the Order on their face do indubitably enable His Majesty to charge all property belonging at that date to German nationals within his territories, the appeal seems at first sight to be without foundation.

The appellant is, however, also a British subject by virtue of the place of his nativity, and it is contended that, by the law of England, in this Order in Council at any rate the words "German nationals" do not mean "German nationals, who are British subjects," because the law of England does not recognize dual nationality. I think this is not the true way of stating the proposition. "German nationals" is not a term of art in English law; it is not even an English expression of long standing or general acceptance, but its meaning is not in doubt, and it expresses a relation to the German sovereign, existing under rules of German law and shown in fact to be applicable to given persons. It thus serves as a mode of designating individuals in fact, and for present purposes it is equivalent to "Charles Adolph Kramer."

The real contention must be that, as a matter of construction,

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the words under discussion are subject to an implied exception or proviso. The exception may be expressed by inserting the words "not being British subjects" after the words "German nationals"; the proviso by adding to the paragraph at its end, after the words "ceded to them by the present Treaty," the further words "provided always that the right to retain and liquidate shall not apply to the property of British subjects, which may be situated within any of His Majesty's territories." I am of opinion that, as a matter of construction of a statute, no such implication is legally possible.

My Lords, I agree that English law does not permit a British subject, in virtue of a "dual" nationality enjoyed under the law of a foreign country, to derogate in any degree from his allegiance to the Crown. I agree that, in spite of his enjoyment of such a nationality in fact, a British subject retains before an English Court of law the status of a British subject with all its rights as well as all its obligations. I agree that a British subject is entitled to the enjoyment of his property according to law and that statutes, which are to tax him personally or to charge his property, ought to be plainly expressed and should not be so construed as to have such an effect, if it is a matter of real doubt whether their language is plain in this regard. All this was urged upon your Lordships, but, in my opinion, to no purpose, for here the statutory language is indeed plain beyond a doubt.

Reference was made, legitimately enough, to the facts that the words in question were originally framed as part of the Treaty of Versailles; that they form part of a scheme in that Treaty, which is therefore their context; that in practice it has been exceptional for some generations past to take without compensation the property of private persons as part of the process of making peace between sovereigns; and that, if it was thought necessary to authorize the Crown to charge or take the property of British subjects within the realm, the natural way in which to do this would be by a direct application to the Legislature and not deviously by including a stipulation to that effect in a treaty with a foreign

power, followed by legislation passed for the purpose of giving effect to that treaty.

I hope that I have correctly appreciated these considerations, but I think that none of them can prevail against clear language in an Order in Council made with statutory authority. In my opinion none of them applies to that language at all. Reading the relevant parts of the Treaty as the context of the words under construction, I find that s. IV. of Part X. of the Treaty dealt with and settled a question, involving private property, rights and interests, which had during the war been the subject of exceptional war measures by the Governments of the countries in which they were situated. Among other things arising from these measures there was obviously a large crop of claims by the owners of the property so dealt with, which, if pursued by separate actions in the countries where the property had been situated, might result in tardy, infructuous and exasperating legal procedure. A machinery was accordingly created for the purpose of satisfying those claims in the country to which the claimant belongs, by charging in that country the property of the nationals of the country against which the claims would otherwise be made, and by providing for the liquidation of that property, in order to raise the funds required for payment of compensation. This is one of the "principles" on which the section speaks of the question as being "settled." I think it is plain that the scheme throughout deals with German nationals on the one hand and persons who are not German nationals on the other, and contemplates the liquidation of the property of the former for the satisfaction of the claims of the latter, the right of liquidation being given to the particular Power among the Allied and Associated Powers, in whose territory the property of such German nationals happens to be situated. It would have been inconsistent with such a scheme to have introduced any exception in favour of cases of dual nationality. If that term means, as the appellant contended, that the ambiguous person, who enjoys such a mixed status, is for some purposes, say, British and for some German, then I think it is plain that

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the scheme of the Treaty and of the Order in Council is to make him German for the purpose of enabling his property situated in England to be liquidated by the Crown. It may involve some hardship in exceptional cases, though there is always Germany's obligation to compensate the sufferer for him to fall back upon, but, if so, it is a hardship which is now imposed on "German nationals" by law.

My Lords, the scheme of the Treaty also furnishes the answer to the observation that an English statute is the appropriate mode of confiscating a born Englishman's possessions in England. The Treaty is, in effect, not bilateral only but multilateral. It is admitted that it enables the French Government, for example, to liquidate Mr. Kramer's property in France, if any; and clearly this is involved in the scheme, but if, either expressly or by implication, the Treaty excepted from the general operation of the scheme such German nationals as were likewise British subjects, the French Government in such a case would lose this benefit, or enjoy it only precariously and subject to the right of His Majesty's Government to interpose for the protection of Mr. Kramer, as one of His Majesty's subjects. If, on the other hand, the exception is deemed to be a limited one, having only the particular effect of disabling His Majesty's Government from liquidating Mr. Kramer's English property, the scheme would then have a partial application, though it was adopted equally and generally by all the Allied and Associated Powers. The construction of the term "German nationals," as applicable, whether the German national does or does not owe allegiance to another State as well as to Germany, has the effect of giving to each Allied Power the right to deal with property in its own territories, free from interposition by another Allied Power, and so it is of special value in the Treaty.

My Lords, the particular facts relating to the career of the appellant do not appear to me to affect the question. Whether he is a meritorious or an obnoxious person, whether his sympathies were with the land of his birth or with the land of his upbringing, or whether he would have been quite willing to have kept out of the whole conflict in the peaceful atmosphere

of Bangkok, if only the King of Siam had done so, too, are interesting but immaterial speculations. The Order in Council is expressed in precise and general terms, and this is fortunate, since many of the questions raised by the appellant are really political questions, which judges, as judges, are but ill equipped to solve.

As for *The Ann* (1) I do not think it is in point. As I apprehend, no new question, upon the general law affecting allegiance and what is called dual nationality, arises for decision on the present occasion, for nothing is in question here but the true construction of the Order in Council made under the Treaty of Peace Act, 1919. In so far as Sir William Scott discussed that general law, it is not necessary to pursue the subject; in so far as he decided on the language of the Order in Council then in question, his decision is foreign to the present appeal.

I concur in the Lord Chancellor's observations about the general licence issued by His Majesty and in the motion moved from the Woolsack.

Sir Ernest Pollock K.C. having stated that the Crown did not ask for costs:—

Order of the Court of Appeal affirmed, and appeal dismissed without costs.

Lords' Journals, May 4, 1923.

Solicitors for the appellant: *Rehder & Higgs.*
Solicitor for the respondent: *Treasury Solicitor.*

(1) 1 Dod. 221.

[HOUSE OF LORDS.]

H. L. (E.)* 1923. *June* 8.

PUBLIC TRUSTEE . . . . . APPELLANT;

AND

WOLF AND OTHERS . . . . . RESPONDENTS.

Alien—Married Woman—German National—Statutory Charge—Life Interest in settled Funds in England—Restraint on Anticipation—Treaty of Peace Order, 1919, *s.* 1, *sub-s. xvi.*

The charge imposed by s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919, upon all property, rights and interests in this country belonging to German nationals at the date of the coming into force of the Treaty of Versailles attaches to the interest of a married woman, who is a German national, in property in England settled upon her for life without power of anticipation, notwithstanding the restraint upon anticipation.

Decision of the Court of Appeal [1923] 1 Ch. 56 reversed.

APPEAL by the Public Trustee, as custodian of enemy property in England and Wales, from an order of the Court of Appeal (1) reversing, upon the point now under appeal, an order of Russell J. (2)

The respondent, Marie Louise Wolf, who was by birth a British subject, married in 1901 her present husband, Carl Philip Jacob Wolf, who was then and now a German national, and by a settlement made in English form on the occasion of the marriage certain property in this country to which Mrs. Wolf was then entitled was settled upon trust to pay the income thereof to her during her life for her separate use without power of anticipation.

The question raised by the appeal was whether this life interest, to which on January 10, 1920, the date on which the Treaty of Versailles came into force, Mrs. Wolf was entitled in reversion subject to life interests in the fund of her father and mother, both of whom were then living, was subject to the charge imposed by the Treaty of Peace Order, 1919, upon all property, rights and interests within His Majesty's

* *Present:* EARL OF BIRKENHEAD, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

(1) [1923] 1 Ch. 56. (2) [1922] 1 Ch. 302.

Dominions and Protectorates on January 10, 1920, belonging to German nationals.

The facts are fully stated in the report of the case before Russell J. and sufficiently appear from the judgment of the Earl of Birkenhead.

Russell J. held that Mrs. Wolf's interest was subject to the charge created by the Treaty of Peace Order, 1919, notwithstanding that she was restrained from anticipation, but his decision was reversed by the Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.), who held that her interest was not affected by the charge.

June 5, 7, 8. *Sir Ernest Pollock K.C.* and *Clauson K.C.* (*Sir Douglas Hogg A.-G.* and *Gavin Simonds* with him) for the appellant. The statutory charge imposed by the Treaty of Peace Order, 1919, takes effect on the wife's interest in the settled funds notwithstanding the restraint on anticipation. The words "property, rights and interests" are of the widest possible import, and it is to misunderstand the Treaty of Peace and the Order in Council to read into them a limitation that no charge is to be created except such as Mrs. Wolf could herself have created. This property belongs to the married woman and the restraint on anticipation, which is a creation of equity for the purpose of protecting the wife against her husband, cannot affect the matter. The restraint is a fetter superimposed upon the property; it is not a modification of the property itself. *Axford* v. *Reid* (1), so far as it goes, supports the appellant's contention. It was there held that s. 12 of the Married Women's Property Act, 1870, which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled to her separate use without power of anticipation. *In re Wheeler's Settlement Trusts* (2), which decided that under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, where a married woman, entitled to separate

(1) (1889) 22 Q. B. D. 548.

(2) [1899] 2 Ch. 717, 720.

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estate with a restraint on anticipation, trades separately from her husband and becomes bankrupt her separate estate subject to the restraint on anticipation vests in her trustee in bankruptcy, recognizes *Axford* v. *Reid* (1) as an authority for the proposition that where the Legislature deals with the separate property of a married woman it includes property which she is restrained from anticipating, unless it is excepted by the express provisions of the statute. *Loraine* v. *Loraine* (2), assuming that it was rightly decided, was a decision under s. 45 of the Matrimonial Causes Act, 1857, and does not affect the question. A decision on a domestic statute cannot determine the meaning of the Treaty of Peace Order. [They also referred to *Tullett* v. *Armstrong*. (3)] The fact that the restraint on anticipation is a fetter on the property in the hands of the married woman is not a reason for holding that it is a fetter in the hands of the Public Trustee. This lady is a German national and the property in question is her property. It is therefore included in the charge.

W. A. Greene K.C. and *Wallington* for the respondent, Mrs. Wolf. It is not contended that the Legislature could not override a restraint on anticipation, but here no sufficiently clear and precise language is used for that purpose. Where it is said that the restraint on anticipation is an integral part of the trust, as it is admitted to be, that means that the interest of the married woman is an interest of an alimentary nature such that the trustees cannot pay it over to any other person until the interest accrues. The restraint on anticipation is a fetter on the conscience of the trustees, who are bound to disregard the claim of anybody else, because the settlor has so said. If the alimentary character of the interest is to be altered, that can only be effected by rewriting the trust disposition. If the Treaty of Peace Order amounts to an overriding paramount direction to the trustees there is no more to be said, but it is not part of the scope of this Order

(1) 22 Q. B. D. 548.
(2) [1912] P. 222.
(3) (1838) 1 Beav. 1, 21, 25, 27, 32; (1840) 4 My. & Cr. 377, 390, 394.

to alter a trust instrument, and it has not done so. The terms of the trust are the sole foundation of the married women's right, and this matter should be approached from the point of view of the duty imposed by the settlor on the trustees: *Montgomery* v. *Zarifi*. (1) *In re Fitzgerald* (2), which was a case of an alimentary provision in favour of a male under a Scottish settlement (which by the law of Scotland is valid), shows that this is a matter which does not depend upon the personal capacity of the beneficiary. The present case is distinguishable from a case of infancy or lunacy, because in those cases the disability is not due to the action of the settlor but to the general law of the land. In restraining alienation the Courts were not creating a new incapacity, but were recognizing the right of the settlor to create a new kind of trust, which could only be valid in the case of a married woman. *Loraine* v. *Loraine* (3) supports the respondent's contention. Sect. 45 of the Matrimonial Causes Act, 1857, empowered the Court, "if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion" to order a settlement of the property of the guilty wife for the benefit of the innocent party and of the children of the marriage, but the Court of Appeal held that they had no jurisdiction to order a settlement of property subject to a restraint on anticipation, and they contrasted the power conferred by s. 45 of the Act of 1857 with the power conferred by s. 5 of the Matrimonial Causes Act, 1859, which in terms enabled the Court to vary and alter settlements. All the judges of the Court of Appeal in that case took the view that to order a settlement of property which the wife was restrained from anticipating would amount to a variation of the settlement under which the restraint was imposed. Yet the Legislature was there contemplating a settlement being ordered by the Court to be made against the wife in invitam. So here there is no power under the Order in Council to vary instruments from which the wife's title was derived.

(1) 1918 S. C. (H. L.) 128, 135.
(2) [1904] 1 Ch. 573.
(3) [1912] P. 222, 227, 229, 230, 232.

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Michell v. *Michell* (1) is an earlier decision to the same effect. In *In re Wheeler's Settlement Trusts* (2) Cozens-Hardy M.R. was wrong in disregarding the important words of s. 1, sub-s. 5, of the Married Women's Property Act, 1882, "as if she were a feme sole"; and in *Axford* v. *Reid* (3) Fry L.J. based his decision to a large extent upon the final words of s. 12 of the Married Women's Property Act, 1870, "as if she had continued unmarried." Sect. 125 of the Bankruptcy Act, 1914, which in substance re-enacts s. 1, sub-s. 5, of the Married Women's Property Act, 1882, makes a married woman who carries on a trade or business liable to the bankruptcy laws. Sect. 38, which describes the property of the bankrupt divisible amongst his creditors, says nothing to exclude property restrained from anticipation. Sect. 167 defines property in terms wide enough to include property restrained from anticipation, but that it is not included is shown by s. 52, which requires the trustee to apply for an order of the Court to get payment of such property. If the vesting provisions had been sufficient s. 52 would have been unnecessary.

[LORD ATKINSON. Sect. 10 of the Landlord and Tenant Act (Ireland), 1860, provides that where any lease has been made containing an agreement prohibiting assignment it shall not be lawful to assign the lands contrary to such agreement without the consent in writing of the landlord, yet it has been held that that does not prevent the lease vesting in assignees in bankruptcy.]

That was a mere case of personal incapacity and is distinguishable from the present case on that ground. All that the Public Trustee can demand is to be put in the shoes of the married woman; there is nothing in the Order to vary or enlarge her interest, and he must take the property as he finds it.

Ashworth James for the remaining respondents, the trustees of various instruments above mentioned.

(1) [1891] P. 208, 210, 215. (2) [1899] 2 Ch. 717.
(3) 22 Q. B. D, 548.

Clauson K.C. in reply was requested to confine himself to the effect of *Loraine* v. *Loraine*. (1)

In that case at the time when the petition for a settlement was filed the respondent (the guilty wife) was a feme sole, but before the petition came on for hearing she had married again, so that the restraint again became operative. That decision can only be justified, if at all, on the ground that under s. 45 of the Act of 1857 the Court could only do that which the parties could do. The policy of the Treaty of Peace Order is different. It imposes a charge, and in one sense it alters the trust, in that the duty of the trustee ceases to be to pay the income to the tenant for life and becomes a duty to discharge the charge. In *Loraine* v. *Loraine* the Court construed the section, not as showing that the Court had an overriding power, but as authorizing it to order such a settlement as the parties could make. It was not seriously argued there that the Court could override the restraint, but the argument was that the respondent could not by her own action hamper the power of the Court.

EARL OF BIRKENHEAD. My Lords, this is an appeal by the Public Trustee as Custodian of Enemy Property in England and Wales against an order of the Court of Appeal dated July 31, 1922. The question raised by the appeal is whether a charge created by s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919, to which I will refer more particularly in a moment, overrides a restraint on anticipation to which the life interest of Mrs. Wolf was subject under a certain settlement, with the result that the income would be payable during the life of Mrs. Wolf to the Public Trustee as Custodian of Enemy Property, or whether the charge only affected such life interest, subject to the restraint on anticipation. The learned judge who dealt with the matter at first instance took the first view; the Lords Justices in the Court of Appeal were agreed in preferring the second.

It is necessary that I should state in outline the facts of

(1) [1912] P. 222.

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the case, in order that the point of law which requires decision may be illustrated.

Spencer Rush, a British subject, was the son of William and Anna Spencer Rush, and he was the father of Mrs. Wolf. By a settlement dated April 20, 1876, made in contemplation of his marriage, Spencer Rush settled certain funds upon the following trusts, one-half of the income for Spencer Rush for life and the other half on a discretionary trust for himself, his wife and children, during his life; after the death of Spencer Rush the sum of 300*l.* per annum was to be paid out of income to his widow during her widowhood, and subject to this, both the capital and income for the issue of Spencer Rush as he should by deed or will appoint; and then there were provisions made in default of his appointment with which we are not concerned. William Rush, the father of Spencer Rush, by a will dated April 5, 1878, devised and bequeathed his residuary estate to trustees upon the following trusts, to his wife Anna Spencer Rush for life; subject thereto to Spencer Rush for life, and subject thereto as to capital and income to the children of Spencer Rush as Spencer Rush should by deed or will appoint, and in default of appointment to all the children of Spencer Rush who being male should attain the age of twenty-one years or being female should attain that age or marry; and there were subsidiary provisions which again do not concern us. William Rush died on November 4, 1880; and by her will dated February 2, 1881, Anna Spencer Rush, the widow of William Rush and the mother of Spencer Rush, directed her trustees to invest the sum of 500*l.* and to pay the income to her daughter-in-law, Louise Rush, during her life, and she devised and bequeathed her residuary estate upon trust for Spencer Rush for life, and subject thereto as to capital and income for his issue as he should by deed or will appoint, and in default of appointment for all the children of Spencer Rush who being male should attain the age of twenty-one years or being female should attain that age or marry equally; and there were certain other provisions with which I need not trouble your Lordships.

Anna Spencer Rush died on February 8, 1881. Spencer Rush died on October 14, 1920; he had three daughters, of whom one was the respondent, Mrs. Wolf. He did not exercise any of the powers of appointment conferred on him, either by the will of William Rush or by the will of Anna Spencer Rush, or by the Spencer Rush Settlement. Mrs. Wolf, the respondent in this case, was by birth a British subject, but in the year 1901 she married Carl Phillip Jacob Wolf, who was and is a German national. By the Wolf settlement of August 12, 1901, made in contemplation of the marriage of Mrs. Wolf and Carl Wolf, Mrs. Wolf assigned to the trustees therein named all her interest in the trust fund, subject to the Spencer Rush Settlement, and the various instruments to which I have referred. The fourth clause of the Wolf settlement is the one with which we are most closely concerned, and it was to this effect: "The Trustees or Trustee shall pay the income of the trust fund to the wife during her life for her separate use without power of anticipation (whilst married)." It remains to be added that the trust funds comprised in the will and settlement were and are within the jurisdiction of the English Courts. The trustees are British citizens resident in this country.

My Lords, enough has now been said of the circumstances under which this property, affected by restraint on anticipation, fell within the operation of the Treaty of Versailles to make it convenient now to examine the relevant articles and Order with a view to determining the matter which arises for decision.

Art. 297 of the Treaty of Versailles is as follows: I deal only with the relevant portions of it: "(*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty." "(*c*) The price or the amount of compensation in

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respect of the exercise of the right referred to in the preceding paragraph (*b*) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated." "(*i*) Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

It is necessary next to consider the terms of para. 4 of the annex to s. IV. of Part X. of the Treaty of Versailles. That is to the following effect, and these are the words which most closely require construction in the issue which your Lordships have to decide : " All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war."

One other reference must be made to the various instruments which, taken together, comprise the Treaty of Peace and its consequent Orders ; that reference is to s. 1 of the Treaty of Peace Order, 1919, which was made in pursuance of the Treaty of Peace Act, 1919. It is provided by s. 1 that the sections of the Treaty set out in the Schedule, which include the provisions to which I have drawn your Lordships' attention, should have the full force and effect of law, and that for the purpose of carrying out those sections the provisions set forth therein should have effect, and it was thereby provided in sub-s. xvi. that all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under

any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are thereby charged with certain payments which are therein mentioned. It remains only on this part of the case to add that the Treaty of Versailles came into force on January 10, 1920.

My Lords, in these circumstances the question which requires decision, one not altogether free of difficulty, is whether the words which I have read of para. 4 of the annex to s. IV., Part X., of the Treaty cover the case of the property of a German national which has been affected by that fetter, as it has been called, which is known to the law of England as a restraint upon anticipation.

The general conception of a restraint upon anticipation is, by now, extremely familiar to lawyers. It has received explanation and exposition by Courts of the highest authority, and with its general features those who are concerned in such matters are familiar. The case which arises to-day is not, in my judgment, really analogous to any of the decisions which learned counsel have pressed upon your Lordships. My reason for stating this conclusion is the conviction that in construing the language of the Treaty of Versailles, and in examining the effect which the existence of a restraint upon anticipation should receive, we must most closely remember what was the purpose and object of this Treaty, which is now part of the law of this country. Such an examination, in my opinion, makes it obvious that we cannot gain much guidance from the consideration of the terms of a purely domestic statute passed in different circumstances, in a different atmosphere, and with a different purpose. What was the purpose, well known and, indeed, made plain in its terms by those who drafted the language of the Treaty of Versailles and afterwards incorporated that instrument in the domestic law of this country, is notorious, and indeed has been proclaimed. The purpose was—and I am not concerned to examine whether it was harsh or oppressive or whether it was not: such considerations are not for this House, sitting judicially—but their plain, and, indeed, their

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avowed purpose upon the face of the instrument was, to carry into the meshes of the financial net the property, so far as they could, of German nationals, which could be made the subject matter of collection in this country.

Conceive now of the attitude of those who drew up this instrument, who perfected, so far as they could, the machinery for collecting as much of the property of German nationals as was available for their purpose—conceive of their attitude if they had been met by an objection of this kind: "You cannot touch the property of a German national because the law of England, for the protection of that German national, has said, 'In order that your husband may not spend, or influence you to spend, your income prematurely, there has been established a restraint upon anticipation.'" I am quite certain that those who drew up this Treaty and those who afterwards incorporated it in the domestic law of this country would have said that was an utterly irrelevant consideration. The object of this Treaty is to collect the property of German nationals, and when you apply your mind to certain assets, the only question you have to ask yourselves is: "Aye or no, is this the property of a German national?" and if it once be established that it is the property of a German national, it becomes an irrelevant circumstance that for the protection of an individual German national, if she had not been expropriated from her property by paramount force, there would have been disabilities on her upon the mode of handling it. One must ask oneself—and it became more and more clear throughout the argument that this was the only point in the argument—What is the meaning of the relevant article: "All property, rights, and interests of a German national"?

Now am I to say that this interest, or whatever belongs to Mrs. Wolf, if I may use a neutral phrase for the moment, does not comprise property, rights, and interests of a German national? Mr. Greene did not dispute, when I put the question to him, that this was property; he did not dispute that this was an interest of Mrs. Wolf. Why then, if it be property, and if it be an interest of the respondent, Mrs. Wolf,

does it not fall within the operation of para. 4 ? This question was addressed to Mr. Greene more than once, and the only answer which he made was that until this property actually enured as income of which the respondent, Mrs. Wolf, herself could dispose, it was not possible for the trustee to dispose of it.

It appears to me that one may test the merits of that argument by saying it would not be beyond the power of a Court to order the trustee to hold this income at the disposition of the Custodian of Enemy Property at each moment as and when each one of those payments enured ; and if the matter could be dealt with in that way the substance of the respondent's case disappears, because it is conceded that as and when each of those payments matures, at that moment it becomes property that is available for the purposes of the Treaty of Versailles.

I was much struck by an analogy which arose in the course of the argument, which, if it is conceded, is fatal to Mr. Greene's case, and which, in my opinion, he did not successfully repel. This was the comparison made in argument of the case of a lunatic and the case of an infant. In the case of a lunatic and in the case of an infant there is a disability to deal with the property of the infant in the one case, and the lunatic in the other, and therefore in order to test the strength of the respondent's case I put the question to Mr. Greene, as to whether or not he would admit that in the case of an infant, and in the case of a lunatic, the claim of those who founded themselves upon the Treaty of Versailles could be successfully resisted by pointing to an existing preclusion of disposition. Mr. Greene was constrained to reply that he did not contend that the power of the Custodian of Enemy Property would have been defeasible upon the plea either of infancy or of lunacy.

If the case of the respondent here is well founded, why not ? What is the substance of the objection here ? The substance of the objection here is that the purpose of the framers of the Treaty can be defeated by pointing to

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an inhibition of free disposition. It is utterly immaterial whether the preclusion of disposition springs from what is a fundamental incapacity, or whether it springs, as in the case of a married woman, from a state of affairs which may be entirely fugitive, because it can be removed the moment her coverture ceases. The substance of the matter is that we must ask ourselves whether or not the mere fact that there exists some domestic ground upon which an individual cannot himself or herself freely dispose of his property is to prevent such property being property or an interest which is available within the meaning of para. 4 for the purposes of the Custodian of Enemy Property.

I am not impressed by the various decisions which have been cited to us by Mr. Greene, for the reason that I do not think that any domestic statute is comparable in relation to its avowed policy and purpose with the statute which we have to construe to-day. And my observation upon the cases of *Loraine* v. *Loraine* (1) and *Axford* v. *Reid* (2), with which your Lordships have been so much pressed, would proceed upon those lines. I do not think the Matrimonial Causes Act is an Act which either in the language actually used or in the stated purpose of those who framed it, is comparable to the instrument which has been incorporated in the law of this country, the Treaty of Versailles. It is not for me, sitting here on a case in which we have not to construe the Matrimonial Causes Act, to say whether or not the decision in *Loraine* v. *Loraine* (1) was one that can be sustained. There are dicta in the judgment as to which I confess I should feel myself some slight doubt, but the matter was, as Mr. Clauson has pointed out, not argued, or only argued partially with regard to the matter with which your Lordships to-day are concerned, and the words of the relevant section, s. 45 of the Act of 1857, though they are widely stated, are not words which are comparable in all the circumstances of the case with those which your Lordships have to construe. The material words in that section are these, and, as I have an observation to make upon them, I will read them to your

(1) [1912] P. 222. (2) 22 Q. B. D. 548.

Lordships. "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

My Lords, it occurs to me in the first place that in a matter dealing with the domestic law of this country the observation as applied to s. 45 of the Matrimonial Causes Act, 1857, which has been made in the course of the argument in this case, that it has been the practice of the Legislature to make it quite plain when they intend to permit the restraint on disposition to be disregarded would have been expected to be made plain here. That observation would have had much more force in my mind, when we are dealing with a domestic statute, than when we are construing an instrument such as the Treaty of Versailles.

I am not concerned to say whether the decision of *Loraine* v. *Loraine* (1) is one that I should have reached myself or not. It is sufficient for me to say that in my judgment it by no means concludes the matter your Lordships have to decide.

One other case should be referred to, which if we are to draw any guidance from the decisions to which your Lordships have been referred was one of the most valuable of those cited at the Bar. I refer to the case of *Axford* v. *Reid* (2), which decided that s. 12 of the Married Women's Property Act, 1870, which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled for the separate use of the married woman without power of anticipation. My Lords, there was a passage from the judgment of Lord Esher, then Master of the Rolls, which I think does afford some little guidance to those who have

(1) [1912] P. 222. (2) 22 Q. B. D. 548, 551, 553.

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to decide the issue to-day. He says: "We are asked to put a limitation on the words 'belonging to her for her separate use,' and to add to them some such words as, 'and not subject to any restraint upon anticipation.' But we must apply the ordinary rule of construction, that the words are to be read in their ordinary sense, and in their full sense, unless there be something in the context to limit their meaning. What is there here in the context? I can see nothing in the context or the subject matter of the section entitling this Court to act upon the suggestion to limit the ordinary meaning of the words. If that be so, we are not concerned with any general law, or any equitable or legal rights of the parties; everything depends upon the words of the Act of Parliament, and the right to bring an action against a married woman in respect of her ante-nuptial debts is a right which is absolutely at large if she has any property belonging to her for her separate use." In the judgment of Fry L.J. we find a similar conclusion, very plainly stated. It is true that he uses twice the expression "as though she had continued unmarried," but it is plain, if one carefully considers the sequence of the judgment of the learned Lord Justice, and the arrangement of the argument and the judgment, that he decided the case on the same grounds as Lord Esher. He says: "The real question is whether the words 'any property' belonging to a woman for her separate use, apply only to such property as is free from any restraint on anticipation, or whether they include property subject to such restraint. It is known to every lawyer that a married woman's property is of two kinds, that which is free from, and that which is subject to, restraint on anticipation, and that by far the greater part of the property of married women is settled so as to be subject to the restraint. The Legislature knew this also, and they must be taken to mean what they said in this section, that all the property of a married woman shall be liable to satisfy her ante-nuptial debts. If the section had meant that only one of these two classes of a married woman's property was to be liable to her ante-nuptial debts, it would say so in express terms, and it would not be a fair interpretation of the section

to accede to the suggestion that its plain meaning should be so limited."

My Lords, the broad question in this appeal is whether when we are considering the term "property" we are to confine ourselves to admitted property which the person himself or herself can dispose of, or whether we are to deal with all the property which is the property of the German national.

For the reasons I have given I am satisfied that the Court of Appeal took too narrow a view of the instrument we have to construe. My noble friend, Lord Atkinson, contributed, not for the first time, an important and independent authority in the matter before your Lordships, when he called attention to an Irish illustration, which seemed to me to have great relevancy and importance. I will leave my noble friend to develop it himself in any observations which he will shortly make.

For myself, I am clearly of opinion that this appeal should be allowed, and I so move your Lordships.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. There is the use of a large and comprehensive expression in the Order in Council—namely, "Property rights and interests" of a national. But, my Lords, I should be content to put the question by asking what was the nature of the right possessed by this lady—what was the quality of her title? I cannot have any doubt that the nature of her title was a title to property and to no less than property. Since the Act of 1882 all doubt upon that question is completely set to rest by the fact that it is enacted by that statute (s. 1, sub-s. 1), that a married woman "shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole without the intervention of any trustee."

What accordingly is the result with regard to the life

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interest of this lady under the will of her father? Apart from the question to be presently referred to—of restraint on anticipation—it would follow clearly that under the law of England she could of course have assigned, and assigned for ever, the whole of that interest, or she could have put any kind of charge upon it. There can be no question I think of that proposition so far as I have stated it. I desire to adopt expressly the language carefully chosen by Russell J. in this case. (1) He says: "The interest belongs to her in every sense." "The charge created," he says, "is a statutory charge. Even though the lady is herself prevented from effectively dealing with the income except as to income actually due, the beneficial ownership of the income is in her and in nobody else. There may be a fetter on dominion, but she is the sole beneficiary. The interest belongs to her in every sense." I wholly agree with that, and I hold therefore that we have now to deal with property in its complete sense—property in this life interest in this lady.

The second question is, What is the nature of the restraint upon anticipation as in collision with the charge imposed by what I may call the war legislation? Under s. 19 of the Act of 1882 it is clear that restraints upon anticipation can in the sense there set up of course limit the power and interest; but, my Lords, it will be observed from the language employed by Younger L.J. in this case, to which I specially call attention, that the decision of the Court below proceeds upon this view—namely, that the lady's interest can be conserved for her separate use because, in order to make the war charge, as I may for brevity's sake call it, effective, it would not be a mere restraint on her anticipation, but it would be an interposition of something between the trustees who administer the estate and the recipient.

My Lords, I do not hold with that argument. It is plain that this must in the judgment we are now to pronounce operate to change the destination of the fund accruing from this property. But none the less the true question is whether this charge is created in such a way as to obliterate

(1) [1922] 1 Ch. 310.

the restraint upon anticipation which the will created. My Lords, I see no legal impossibility in that. It is a familiar case of repugnancy. Under the will the lady is restrained from anticipation. Under the Act of Parliament there is no fetter of that kind existing, because another person has been charged with the duty of ingathering the very fund upon which her restraint operated. A repugnancy of that kind is plain.

What then should be the law? Shall the restraint last notwithstanding the existence of the war charge, or shall the supervening power imposed by the force of Parliament be effective for all purposes? My Lords, I have no hesitation in answering that question in the latter sense. That parliamentary charge affects all property; and if the result be to demolish the restraint upon anticipation thereby existing, that was what, in my opinion, Parliament meant to do.

It is said of course that we are asked to alter that which is not the creation of the married woman herself, but is a part of the will of her father under which will unaltered and untouched she must take, and alone take, the interest now in question. The learned Lord Justice (Younger) in one passage of his judgment however proceeds to say that if the restraint is to be ignored or removed this must be so enacted in express terms. I put the point to the learned counsel for the respondents, and he admitted that express terms were not required, and that the plain implication of the parliamentary language would be sufficient. When I look at s. 297 of the Schedule I can have no doubt whatever that this property was meant to be ingathered, that the impediments to the ingathering of it must ex necessitate disappear in view of that repugnancy which I have mentioned.

Were that not so, it would be possible to exclude from the net of this war legislation large blocks of property in England which were subject to domestic arrangements with regard to enjoyment, and I hold that that would be contrary to all principle, and would be a denying of effect to what after all is a very plain Act of Parliament.

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LORD WRENBURY. My Lords, the language of s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919, is as follows: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German Nationals . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged. . . . ." The language of art. 297 (*b*) of the Schedule is "to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German Nationals." And the language of art. 4 of the annex is: "All property, rights and interests of German Nationals within the territory . . . . and the net proceeds of their sale, liquidation or other dealing therewith may be charged," etc.

We have here to do with the life interest of a married woman who is a German national, which is her separate estate subject to restraint on anticipation.

A life interest is property. The tenant for life has no right to the corpus, but he has by way of property a right to the income. Every instalment of income as it falls due is his property. A tenant for life has a right—namely, the right to receive the income as it falls due. A married woman in respect of her separate estate restrained from anticipation has both this property and this right. She has also an interest —namely, such as is enjoyed by a married woman restrained from anticipation. There can be no question therefore that that with which we have to do is within the words "property, rights and interests."

Upon this property, right and interest the Peace Order is expressed to create a statutory charge. But it is contended the charge cannot reach this property because the married woman herself could not create a charge. The question is whether this is well founded.

The judgments in the Court of Appeal seem to me to oscillate between two alternative views of the matter—namely, (1.) that the nature of the property is such that the creation of a charge upon it is impossible, and (2.) that the language of the Order is not such as to create a charge. The former seems to be the view of the Master of the Rolls. He

says (1): "Though Mrs. Wolf has an interest in the income, and though the Order in Council does create a charge upon that interest, it only creates a charge upon it as it exists"—so far I entirely agree—but he continues, "and that, therefore, there is no effective charge which operates to deprive Mrs. Wolf of the instalments of the income when they become due." With those last words I do not agree. They seem to me to confuse two things which are distinct. The consequence does not follow from the premiss. The interest as it exists is one upon which the lady cannot create a charge, but it does not follow that it is an interest upon which a charge cannot be created adversely to her. I agree with the Master of the Rolls that the restraint is not a mere personal disability but is a part of the trust under which the married woman takes her interest. But it is a part which does not exclude the possibility of the creation of a charge not by her but adversely to her. The testator was competent to give her the property and to render it inalienable by any act of hers, but it was not competent to him to exclude the possibility of alienation adversely to her. It would be plainly possible, for instance, that by statute the life interest restrained from anticipation should be taken away. Thus, suppose that a Bankruptcy Act provided that the life interest of a married woman restrained from anticipation should be assets for payment of debts, obviously the statute would have effect. The legality of a disposition to give property on the terms that a married woman shall be incompetent to part with it does not carry with it the legality to provide furthermore that it shall not be taken away adversely to the owner. To do that it is necessary to find a new right of disposition of property unknown to the law—namely, a right to dispose on the terms that the owner shall not, nor shall any one adversely to the owner, even if authorized by statute, take away the property.

The first alternative, therefore—namely, that the nature of the property is such that the creation of a charge upon it is impossible—cannot be maintained.

The second alternative is that the language of the Order is

(1) [1923] 1 Ch. 63.

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not such as to create a charge. The latter part of the judgment of Younger L.J. looks as if he was deciding the case on this ground. "The words of the Order," he says (1), "are not sufficient to charge her interests." There must be, he suggests, "express terms." But on the other hand he has earlier said that her interest is not caught by the charge, and that his "reason for that conclusion is that the effective restraint upon the anticipation . . . . is not the result of any disability on her part, but is a condition validly attached to the interest itself by the person, be he settlor or testator, who created it." Warrington L.J.'s judgment seems also to oscillate between deciding the case upon the nature of the property and deciding it upon the language of the Order.

The decision in *Axford* v. *Reid* (2) is, as I read it, directly in point. It is quite true that the last words of s. 12 of the Married Women's Property Act, 1870, "as if she had continued unmarried," would without more have been sufficient to decide the case as it was decided. For if she had remained unmarried there would have been no restraint on anticipation. If this ground were taken there was nothing to discuss about restraint on anticipation. Notwithstanding the earlier part of the judgment of Fry L.J., it is obvious that the Court did not decide upon those words. Their decision was upon what Fry L.J. calls "the real question"—namely, whether the words "any property" belonging to a woman for her separate use apply only to such as is free from any restraint upon anticipation, or whether they include property subject to such restraint. The decision was that the words applied to property subject to a restraint. Both judges give judgment upon this, and only upon this.

Apart, however, from *Axford* v. *Reid* (2), I am of opinion that the decision below is erroneous, upon this short ground, that the Peace Order can operate upon the separate estate of a married woman restrained from anticipation because it is property of hers and is by statute affected by action adversely to her and not by act done by her. With that state of things a restraint on anticipation has nothing to do. She is not

(1) [1923] 1 Ch. 73, 75, 76. (2) 22 Q. B. D. 548.

anticipating. The last thing she would do, no doubt, is to anticipate so as to give effect to the Peace Order. Her property is by statute affected adversely to her.

I may add that I cannot in any case follow those words of the Order under appeal which express that the declaration that the interest is not charged is "without prejudice to any claim by the Public Trustee that the charge may attach if the said Marie Louise Wolf should become discovert." When the lady becomes discovert the restraint will of course be gone. But as each item of income falls in and is payable to her the restraint is equally gone, and she can deal with it as she likes. In any view of the case and assuming that the existence of a restraint on anticipation is relevant, which I think it is not, there cannot arise from the existence of the restraint any impediment in law to a charge created, not by, but adversely to, the married woman, which reaches every item of the property as it becomes free from the restraint. The married woman of course cannot execute an assignment affecting future income—the Trustee must disregard any such. But a charge created adversely to the married woman is not in like case.

My Lords, I think the appeal succeeds and the order of Russell J. as regards this life interest must be restored.

LORD CARSON. My Lords, I concur with the motion proposed by the noble Earl on the Woolsack.

Order of the Court of Appeal reversed, and order of Russell J. restored: By consent the costs of the respondents other than the respondent Marie Louise Wolf in respect of the appeal to this House to be taxed as between solicitor and client to be paid out of the capital of the funds, and the costs of the appellant and the respondent Marie Louise Wolf in respect of the said appeal to this House to be taxed as between solicitor and client and paid out of the accumulations of income accrued upon the

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fund in medio, and if such accumulations of income are not sufficient to meet the amount of such costs, then out of the income accruing during the life of the said respondent Marie Louise Wolf. Cause to be remitted back to the Chancery Division of the High Court to do therein as shall be just and consistent with this judgment.

Lords' Journals, June 8, 1923.

Solicitors for the appellant: *Coward & Hawksley, Sons & Chance.*

Solicitors for the respondent, Marie Louise Wolf: *Cruesmann & Rouse.*

Solicitors for the remaining respondents: *Williams & James.*

[HOUSE OF LORDS.]

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PORTLAND COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MURRAY . . . . . RESPONDENT.

JOHN WATSON, LIMITED . . . . . APPELLANTS;

AND

QUINN . . . . . RESPONDENT.

WILLIAM DIXON, LIMITED . . . . APPELLANTS;

AND

MADDEN . . . . . RESPONDENT.

Workmen's Compensation—Partial Incapacity—Method of Assessment—Review of weekly Payments—Fall in Wages—Strike—Inability to get Employment—Earning Capacity—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *First Schedule, paras.* 1 (*b*), 3, 16.

Where, after a period of total incapacity, an injured workman, having been given light work, is paid compensation in respect of partial incapacity, and then, owing to a general rise in wages, the actual wages earned

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

at the light work exceed his average weekly earnings prior to the accident and payment of compensation is suspended, and ultimately, owing to a further change in the conditions of the labour market, either the wages earned at the light work fall below the pre-accident wages or no light work is available for him, there being no change in the man's physical condition, his right to receive compensation for partial incapacity revives, and the amount of compensation payable must be determined by arbitration, having regard to what the man is competent to earn in the circumstances of the case.

Decision of the Second Division of the Court of Session in Scotland affirmed in each case.

THEIR Lordships, in delivering judgment in these appeals, dealt with the three appeals together. The question in each case had reference to the proper mode of assessing compensation under the Workmen's Compensation Act, 1906, in respect of partial incapacity, having regard to recent changes in the state of the labour market.

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Appeal from an interlocutor of the Second Division of the Court of Session reversing a determination of the Sheriff-Substitute as arbitrator under the Workmen's Compensation Act, 1906.

On February 23, 1917, the respondent, a miner in the employment of the appellants, sustained injury by accident arising out of and in the course of his employment. As a result of the accident there was a shortening of the right leg and he walked with the aid of a stick, and he was permanently incapacitated from following his former work as a miner. Prior to the accident the respondent's average weekly earnings were 2*l*. 7*s*. The respondent was paid compensation on the footing of total incapacity from February 23, 1917, till May 25, 1918, after which date the appellants, having given him light work on the surface, paid him partial compensation until May 15, 1920. Thereafter, in consequence of increases in wages granted to all mine workers, the respondent's weekly earnings equalled or exceeded what he made before the accident, and as a result the appellants ceased paying him any compensation. This state of matters, in which the respondent

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acquiesced, continued till March 31, 1921. On April 1 all the appellants' employees ceased work by reason of the national strike, which lasted till July 3, 1921. In consequence of the strike the pit became flooded and had to be restored before mining could be resumed.

The respondent, having been unemployed since April 1, 1921, instituted arbitration proceedings for the purpose of obtaining an award of compensation. At the date of these proceedings the appellants had offered to reinstate the respondent in his former light employment as soon as it became available, but it was not known when that might be. It was agreed that the weekly wage then attached to that kind of employment was 1*l.* 8*s.* Prior to the accident the respondent had on three occasions during periods of dullness in the mining industry worked as a mason's labourer, and for such labour there had been since April 1, 1921, a reasonable demand. For this class of work the respondent was totally incapacitated as a result of his accident. The respondent was classified as unfit in the list of unemployed made up for the Kilmarnock Unemployment Bureau, at which (among other places) he had been seeking employment. The Sheriff-Substitute found that the respondent's failure to obtain outside employment was due not to his injury but to the state of the labour market; had the workman been uninjured the great probability was that he would have been then unemployed. He further found that at that time there were large numbers of able-bodied miners unemployed and that the respondent's search for work might have been equally unsuccessful had he been uninjured, but that owing to his partial incapacity the respondent's chances of obtaining employment were materially narrowed.

In these circumstances the Sheriff-Substitute held that at the date of the proceedings, the respondent's unemployment not being due to his physical incapacity, he was not in hoc statu entitled to compensation and refused it; but, as the respondent's job at light work would mature in the near future, he thought it desirable to fix the compensation to which in his opinion the respondent would then be entitled and thus avoid the necessity for another arbitration. He accordingly

awarded the respondent compensation at the rate of 12*s.* 6*d.* per week to begin when his former employment became available. The questions of law for the opinion of the Court were, so far as material: (1.) Whether on the foregoing facts the Sheriff-Substitute was entitled to refuse compensation to the respondent in hoc statu, and (2.) whether he was entitled to award compensation as from a future date when the respondent's former job became available.

The Second Division (the Lord Justice-Clerk, Lord Hunter, and Lord Constable) answered the first question in the negative, and found that the second question did not arise. They therefore reversed the determination of the Sheriff-Substitute and remitted the case to him to award compensation.

1923. May 3. *Graham Robertson K.C.* (of the Scottish Bar) (with him *Albert Russell* (of the Scottish Bar), and *H. W. Beveridge* (of the English Bar)) for the appellants. The arbitrator has found as a fact that the respondent's inability to obtain employment was not due to his physical incapacity but was due to the conditions of the labour market, and on the evidence he was entitled to reach that conclusion. He was therefore right to refuse compensation to the respondent in hoc statu. Inability to obtain employment which is not the result of the man's personal incapacity but arises from some disturbance of the labour market, such as a strike, cannot be taken into account in the estimate of his loss of earning power: *Quilter* v. *Kepplehill Coal Co.* (1); *Cardiff Corporation* v. *Hall* (2); *Ball* v. *William Hunt & Sons* (3); *Woodhouse* v. *Midland Ry. Co.* (4); *Gaffney* v. *Chorley Colliery Co.* (5); *Middleton* v. *Wharncliffe Woodmoor Colliery Co.* (6); *Henson* v. *Ruston & Hornsby* (7); *Evans* v. *Cory Brothers & Co.* (8) On the other hand the arbitrator was not entitled to award compensation to commence from an unascertainable date in the future.

(1) 1921 S. C. 905.
(2) [1911] 1 K. B. 1009, 1017–18, 1027.
(3) [1912] A. C. 496, 508.
(4) [1914] 3 K. B. 1034.
(5) (1922) 15 B. W. C. C. 158.
(6) (1922) 15 B. W. C. C. 166, 169.
(7) (1922) 15 B. W. C. C. 195, 197.
(8) (1912) 5 B. W. C. C. 272.

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Morrice Mackay K.C., *Normand* (both of the Scottish Bar) and *S. B. Sandeman* (of the English Bar) for the respondent were not called on.

The House took time for consideration.

JOHN WATSON, LIMITED *v.* QUINN.

Appeal from an interlocutor of the Second Division of the Court of Session affirming a determination of the Sheriff-Substitute of Lanarkshire as arbitrator under the Workmen's Compensation Act, 1906.

On May 20, 1914, the respondent sustained injury to his back by accident arising out of and in the course of his employment as a miner with the appellants. His average weekly earnings prior to the accident were 2*l.* 4*s.* Compensation in respect of total incapacity was paid to him down to November 8, 1915. Subsequently, under an award dated January 17, 1917, the respondent was awarded 10*s.* 4*d.* per week compensation in respect of partial incapacity. Payment of compensation at that rate was made down to May 25, 1920. Thereafter, owing to the rise in wages, payment of compensation was stopped because the respondent was earning more than his average weekly wage prior to the accident. On November 11, 1921, the respondent asked that payment of compensation should be resumed on the ground that, owing to the fall in wages, his wages were much lower than they had been before the accident, and, on the refusal of his request by the appellants, he charged them for payment under the subsisting award. Thereupon the appellants applied for a review of this award and asked that the weekly payments of compensation to the respondent should be suspended as at May 26, 1920. The respondent had been employed at light labouring work on the surface and was at the date of the arbitration proceedings working as a waggon painter. During the period between May 26, 1920, and November 1, 1921, he was able to earn an average wage considerably higher than his average weekly earnings before the accident. But during the

same period he would, but for his injury, have been able to earn as a miner wages much higher than he was able to earn as a surface labourer. From November 1, 1921, the respondent was able to earn about 1*l.* 6*s.* weekly as a surface labourer. But for his accident he would have been able to earn as a miner a wage substantially the same as his average weekly earnings prior to his accident. His total earnings between May 25, 1920, and January 23, 1922, showed an average wage higher than his average weekly earnings prior to the accident. It was agreed that the respondent's physical condition and fitness for work had not altered since May 25, 1920.

The arbitrator by his award declared that the liability of the appellants to pay compensation to the respondent ended only for the limited period from May 25, 1920, to October 31, 1921, in respect that during that period the respondent was able to earn wages in excess of his average weekly earnings prior to the accident, and he awarded him compensation in respect of partial incapacity of 9*s.* per week from October 31, 1921.

The questions of law for the opinion of the Court were: (1.) On the foregoing facts were the appellants entitled to an award which simply ended payment of compensation as at May 25, 1920, until further order? (2.) Was the arbitrator entitled to award the respondent compensation from October 31, 1921? (3.) In ascertaining the respondent's present earning capacity for the purpose of assessing compensation should he have taken as the basis his average weekly earnings for the whole period from May 25, 1920, down to the date of proof?

The Second Division (the Lord Justice-Clerk, Lord Hunter, and Lord Anderson) answered the first and third questions in the negative and the second in the affirmative, and dismissed the appeal.

May 8, 1923. *Graham Robertson K.C.* (of the Scottish Bar) (with him *James R. Marshall* (of the Scottish Bar) and *H. W. Beveridge* (of the English Bar)) for the appellants.

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The appellants would clearly have been entitled to a suspensory award if they had applied for it when the respondent's wages exceeded his pre-accident wages. Therefore in substance, though not in form, this is an application by the respondent for a review of an award suspending his right to compensation. There is no ground for such review, because a general fall of wages affecting both injured and uninjured workmen is not a change of circumstances entitling the respondent to apply for a review, and the loss suffered by the respondent since November 1, 1921, is due to economic causes and is not personal to himself. The arbitrator should therefore have suspended the weekly payments as from May 26, 1920.

Fenton K.C., *G. R. Thomson* (both of the Scottish Bar) and *H. Barker* (of the English Bar) for the respondent were not called upon.

The House took time for consideration.

WILLIAM DIXON, LIMITED *v.* MADDEN.

Appeal from an interlocutor of the Second Division of the Court of Session affirming a determination of the Sheriff-Substitute of Lanarkshire as arbitrator under the Workmen's Compensation Act, 1906.

On February 16, 1917, the respondent sustained injury to his left knee by accident arising out of and in the course of his employment as a miner with the appellants. He was paid compensation at first for total incapacity and later for partial incapacity down to March 24, 1920. On the refusal of the appellants to pay further compensation the respondent instituted arbitration proceedings. The arbitrator, by his award dated May 20, 1920, found that the respondent had not fully recovered from the effects of the accident, but ended his compensation until further order on the ground that since March 16, 1920, his weekly earnings had exceeded his average weekly earnings before the accident. The respondent was employed at the lamp cabin and, though he was fit for better work, no better post was available. On account of his partial physical incapacity he was not fit for his previous work as a

miner. His wages at work at the lamp cabin continued to exceed his pre-accident wage until November 24, 1921, when a general fall of wages took place, as a result of which the respondent's wages fell below the pre-accident level. The respondent's physical condition and fitness for work had not changed since March, 1920. Upon application by the respondent for a review, the arbitrator made an award of compensation of 7*s*. 6*d*. per week in respect of partial incapacity from November 24, 1921.

Inasmuch as the reason for ending the respondent's compensation until further orders from March 24, 1920, was solely that, owing to the abnormally high rate of wages, he was able to earn more than his average weekly earnings prior to the accident, although he remained partially incapacitated, the arbitrator held that the respondent was entitled to put forward a claim that payment of compensation should be resumed when the exceptional conditions came to an end, and when it thus became impossible to earn an amount equal to his average weekly earnings prior to the accident.

The questions of law for the opinion of the Court were :—

1. On the foregoing facts was the arbitrator entitled to award compensation to the respondent from November 24, 1921 ?
2. In determining the respondent's compensation rights under the Act was he entitled to have regard to the wages which he would have been earning but for the accident ?
3. On the foregoing facts was the general reduction in wages a change of circumstances entitling the respondent to apply for review of the award by which his compensation was ended until further order ?

The Second Division (the Lord Justice-Clerk, Lord Hunter, and Lord Anderson) answered all the questions in the affirmative, and dismissed the appeal.

1923. May 8. *Graham Robertson K.C.* (of the Scottish Bar) (with him *James R. Marshall* (of the Scottish Bar) and *H. W. Beveridge* (of the English Bar)) for the appellants.

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Fenton K.C., *G. R. Thomson* (both of the Scottish Bar) and *Rewcastle* (of the English Bar) for the respondent were not called upon.

The House took time for consideration.

1923. June 14. EARL OF BIRKENHEAD. My Lords, I have had the pleasure and advantage of reading the judgment of my noble and learned friend Lord Dunedin in this matter, and I so completely agree with the conclusions which are stated in that speech that I find it necessary to add nothing. I have also to say that my noble and learned friends, Lord Finlay and Lord Shaw, find themselves equally in complete agreement with the judgment which I will now read of my noble and learned friend Lord Dunedin.

LORD DUNEDIN (read by EARL OF BIRKENHEAD). My Lords, these three appeals have one common feature. In each of them a workman was injured and after a period of total incapacity was awarded compensation fixed as for partial incapacity, he being able to earn, and de facto earning, a certain amount of wages less than the average pre-accident wage earned when he was an uninjured man. Then came a period of inflated wages due to the war, with the result that his de facto earnings for light work rose to a greater figure than his average pre-accident wage. In terms of para. 3 of the First Schedule of the Act, his right to compensation then became suspended. Wages having fallen his earnings no longer exceeded the average pre-accident wage. His physical condition remained the same, and the wages earned by him having fallen below the pre-accident rate, the question arises whether he is entitled to partial compensation. In each case the Court of Session has held that he is so entitled, and has either affirmed the judgment of the arbitrator awarding such compensation or has remitted the matter to the arbitrator to fix the amount. The appellants in each case have put forward the same argument. They argue that, there being no change referable to the workman himself since his right to compensation was suspended, there is not

such a change of circumstances as warrants an application to the Court to fix the compensation anew, and they cite, in respect of this contention, a number of cases where it has been held that, to allow of application to review under para. 16 of the First Schedule, a change of circumstances must be averred, and that a change of circumstances is not sufficiently averred by merely averring a change in the labour market.

My Lords, it seems to me that the decisions here referred to are quite beside the point. The right of compensation rests not on the Schedule, but on the first section of the Act. "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of the Act." The First Schedule in para. 1 (*b*) deals with total and partial incapacity for work arising from the injury and prescribes the liability as follows: "A weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous 12 months . . . . such weekly payment not to exceed 1*l*." Para. 3 of the same Schedule deals with the fixing of the amount of the weekly payment and says: "In the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident. . . . ." This settles the extreme limit of what is to be paid, but this is a rider on the computation of the amount; it is not a statutory termination or interruption of the state of incapacity. When the words can no longer be applied, then there is no bar to the right which the injured man has to be compensated for partial incapacity. What compensation is then to be paid must obviously, in the absence of agreement, be determined by arbitration. The technical position at the moment may vary according to circumstances, and is well illustrated by the differences of fact between the three cases which I have hitherto taken as one.

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In the case of the *Portland Colliery* v. *Murray* the worker was so injured that he could no longer work as a collier, but was given light work on the surface, and had, in addition to his wages, a compensation award. When, by the rise of wages, his earnings equalled his pre-accident wage, the employer simply ceased to pay the compensation and the workman acquiesced without either having to go to the Court. The light work came to an end owing to the pit being flooded as the sequel of a strike. The workman then applied for compensation, but it does not appear that there was any standing decree on which he could have charged. The arbitrator took the peculiar and unwarranted course of making an award which should be unavailable so long as the man did nothing, but became available as soon as he was able to resume light work, which would be when the pit was free of water. The Second Division rightly recalled this finding, and simply remitted the case to the arbitrator to find what compensation under the circumstances was due.

In *John Watson, Ld.* v. *Quinn* there was an award dated January, 1917, for 10*s.* 4*d.* per week in respect of partial incapacity. Payments were made under that down to May, 1920. Thereafter the wages of the light employment he was engaged in rose to a level higher than the pre-accident wage, and the employer ceased to pay compensation, in which the workman acquiesced. Wages having fallen to a level below the pre-accident wage, the workman applied for payment of the old partial compensation, and that being refused, he charged upon his subsisting decree. The charge was suspended and the application for review was made by the employers. The arbitrator inquired into the facts and made an award fixing partial compensation, payable from the date when wages had fallen so as to prevent the application of the limit fixed by para. 3 of the Schedule. His judgment was confirmed by the Court of Session.

In *William Dixon, Ld.* v. *Madden*, there being an award for partial compensation, and the workman maintaining that even after the rise of wages he was still entitled to the compensation, the arbitrator, on application by the employer,

ended the compensation "until further order." When the wages fell again the workman applied and was awarded partial compensation, and the judgment was confirmed by the Court of Session.

The variation of circumstances depending upon whether there was a standing decree on which a charge could be given really makes no difference. In each case the features are first, partial incapacity found and compensation awarded; second, suspension of the payment of compensation owing to the wages actually earned exceeding the pre-accident wage; and third, wages actually earned fallen below the pre-accident wage. The right to receive compensation for partial incapacity then revives, and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn. The whole position is absolutely different from that to which the appellants seek to assimilate it, i.e., when a workman with a standing award makes an application to have that award altered upon a mere averment that the wages in respect of partial employment have fallen. Even then, the case of *McAlinden* (1), not adverted to by the appellants, may have to be considered.

I am of opinion that the judgments in all three cases are right and the appeals should be dismissed with costs.

LORD ATKINSON. My Lords, I too have had the pleasure and advantage of reading the judgment prepared by my noble and learned friend Lord Dunedin. I thoroughly concur in it and have nothing to add.

In each case :—

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, June 14, 1923.

In the first case :—

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

(1) [1920] A. C. 39.

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Agents for the respondent: *John Kennedy & Co., for Mackintosh & Bain, Solicitors, Kilmarnock, and Macpherson & Mackay, W.S., Edinburgh.*

In the second and third cases:—

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1923. *June* 19.

CHATTERTON . . . . . APPELLANT;

AND

TERRELL . . . . . RESPONDENT.

Landlord and Tenant—Lease—Covenant against Underletting without Consent—Underletting of Part of Premises with Consent—Underletting of Remainder without Consent—Breach of Covenant—Forfeiture.

By an agreement dated March 11, 1919, the plaintiff let a house to the defendant for five years at a rent of 135*l.*, the defendant covenanting not to assign, underlet or part with the possession of the demised premises without the consent of the plaintiff, such consent not to be unreasonably withheld. On February 14, 1920, the defendant, with the consent of the plaintiff, underlet the top floor of the house for three years at a rent of 90*l.* On February 28, 1920, the defendant, without the knowledge or consent of the plaintiff, underlet the remainder of the premises on a yearly tenancy, with the option to the underlessee to continue the tenancy for the residue of the original term, at a rent of 180*l.* In an action for a declaration that the covenant had been broken the plaintiff claimed possession and mesne profits:—

Held, that, although the underletting had been effected by two separate transactions, the defendant had in fact underlet the whole of the premises without the consent of the landlord to the underletting of the whole; therefore the covenant had been broken so as to involve a forfeiture of the lease.

Decision of the Court of Appeal [1922] 2 Ch. 647 affirmed.

APPEAL from an order of the Court of Appeal (1), reversing a judgment of Astbury J.

By an agreement in writing dated March 11, 1919, and

* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

(1) [1922] 2 Ch. 647.

made between Arthur a'Beckett Terrell, since deceased, as landlord, and the appellant, Florence Henrietta Chatterton, as tenant, certain premises known as No. 27 Collingham Place, in the Royal Borough of Kensington, were let to the tenant for a term of five years from March 25, 1919, at a yearly rent of 135*l.*, and the appellant thereby covenanted or agreed (inter alia) in the terms following: "And also will not assign or underlet or part with the possession of the said messuage or premises or this Agreement without the consent in writing of the Landlord for that purpose first had and obtained such consent not to be unreasonably withheld, and as a condition of such consent the Landlord may require the assignee to enter into an Agreement with him direct to observe and fulfil all the conditions and obligations of this Agreement."

The agreement also contained a power of re-entry on the failure of the tenant to observe or perform the conditions therein contained.

On February 14, 1920, the appellant, with the consent of the landlord, agreed to let the top floor of the premises to Ernest Julius Pizer for three years from February 8, 1920 at a yearly rent of 90*l.*

On February 28, 1920, the appellant, without the knowledge or consent of the landlord, agreed to let the premises, except the rooms on the top floor, to Pierre José Boucher on a yearly tenancy at a yearly rent of 180*l.* with the option of continuing as such tenant until the expiration of the appellant's lease.

On discovering the existence of this sub-letting the landlord wrote to the appellant on July 5, 1920, a letter which (so far as material) stated as follows: "On making enquiry at the house I find that upwards of a year ago you left the house and parted with possession of it to some one else who has ever since been in occupation. As you did not obtain or ever apply for my consent to your so doing this is a breach of the condition of your tenancy which entitles me to put an end to it and to re-enter upon the premises. I beg, therefore, to give you notice that I hereby determine your tenancy and must request you forthwith to surrender possession of the house to me in order to avoid the necessity of legal proceedings."

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On October 26, 1921, the landlord commenced this action against the appellant.

By his statement of claim the plaintiff, after setting out (para. 1) the agreement of March 11, 1919, alleged (para. 3) that the defendant duly made application to the plaintiff for leave to sub-let the rooms on the top floor of the premises to one Pizer and that the plaintiff gave his consent thereto. In para. 4 he set out the agreement of February 28, 1920, and in para. 5 he alleged that the defendant did not apply to the plaintiff for his consent to such sub-letting and the fact did not come to his knowledge until June 30, 1921, when he immediately gave notice to the defendant of her breach of agreement and determining her tenancy and demanding possession of the premises, but that the said notice had not been complied with; and he claimed (1.) a declaration that the sub-letting of the premises as set out in paras. 4 and 5 thereof was a breach on the defendant's part of the tenancy agreement set out in para. 1 thereof, and entitled the plaintiff to forfeit the agreement and the tenancy created thereunder; (2.) possession of the premises; and (3.) mesne profits as from February 28, 1920.

The appellant by her defence denied that the said underletting constituted a breach of the agreement.

Astbury J. held that the appellant had not sub-let the whole of the house without the consent of the landlord and he dismissed the action.

The Court of Appeal (Warrington L.J., Younger L.J. and Eve J.), on the contrary, were of opinion that, as the appellant had underlet the whole, though she had done so in two separate steps, and had not obtained the consent of the landlord to that underletting, there had been a breach of the covenant, and that the landlord was entitled to the relief claimed.

Micklem K.C. and *Edgar Dale* for the appellant. The appellant, by underletting part of the demised premises with the consent of the landlord and part without his consent, has not committed a breach of this covenant against underletting. To forfeit her rights under the tenancy agreement

the appellant must have sub-let or parted with the whole of the premises without the landlord's consent. "The Courts have always held a strict hand over these conditions for defeating leases": *Crusoe* v. *Bugby*. (1) Accordingly a covenant against sub-letting the premises is held not to apply to a sub-letting of a part of the premises: *Church* v. *Brown* (2); *Grove* v. *Portal*. (3) It follows that when once the landlord has assented to the sub-letting of a part of the premises he can no longer enforce the covenant as to the remainder. At no time has the whole of this house been sub-let without the consent of the landlord.

It is said by the Court of Appeal that the appellant has parted with the whole of the premises and has obtained no consent to the parting with the whole, but that is not the right way to construe a covenant of this nature, which is to be read most strongly against the landlord. Further the only breach assigned by the landlord in his statement of claim is the second underletting. That is an underletting of part only of the premises without his consent, and upon the authorities that is not a breach.

E. P. Hewitt K.C. and *Cecil Bovill* for the respondent, the legal personal representative of the landlord, were not called upon.

LORD ATKINSON. My Lords, the action upon which this appeal arises is an action brought to recover possession of a house in Collingham Place held by the appellant under a lease made on March 11, 1919, for a period of five years. The lease contains a covenant in these words: "And also will not assign or underlet or part with the possession of the said messuage or premises or this Agreement without the consent in writing of the Landlord for that purpose first had and obtained such consent not to be unreasonably withheld and as a condition of such consent the landlord may require the assignee to enter into an agreement with him direct to observe and fulfil all the conditions and obligations of this agreement."

(1) (1771) 2 W. Bl. 766. (2) (1808) 15 Ves. 258, 265.
(3) [1902] 1 Ch. 727, 731.

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Now the lessee, the appellant, sub-let, with the landlord's consent, the top floor to a person of the name of Pizer for a term of three years. Some time afterwards she sub-let all the remainder of the premises by a demise of February 28, 1920, except the top floor, which she had previously demised. The landlord seeks to treat her sub-letting of the entire premises, part by consent and the remainder without consent, as a forfeiture under one of the conditions of the lease which entitles him to re-enter upon a breach of the conditions.

My Lords, it would appear to me that the case is perfectly plain and that there is nothing whatever in this appeal; because the covenant in the lease is "not to assign sub-let or part with possession of the messuage or premises . . . . without the consent in writing"; she has parted with the messuage without consent in writing; she has only got the consent to parting with the possession of the top floor. She binds herself not to part with the possession of the premises without consent in writing. It would appear to me to be perfectly plain that she has violated the covenant, and entitled the landlord, taking advantage of the condition of re-entry on breach of covenant, to recover possession.

Some observations have been made in argument in reference to the statement of claim. The statement of claim sets out in para. 3 that she has made an assignment by consent, and then it sets out in paras. 4 and 5 that she has made a second assignment without consent, and it is alleged in the statement of claim that by reason of the sub-letting on a yearly tenancy of the remaining portion of the house she has broken her covenant. That is quite reasonable and what is right. It is quite right to set out the fact of the first assignment and then to show that by the other assignment she has practically in the result sub-let the entire premises. It has also been argued that the words providing that the assignee shall enter into an agreement to observe and fulfil all the covenants of the original lease apply to a sub-letting to a tenant from year to year. I think those words are

simply introduced into the clause to show the three descriptions of people who are dealt with; those who are assignees, those who are under-tenants, and those who are put into possession of the premises. I do not think they can be availed of to defeat what would appear to me to be the plain meaning of this clause—namely, that the appellant is not to part with the possession of the premises without consent, whether she does it by one demise or by half-a-dozen demises. That is what she has covenanted not to do and what has rendered her liable to have her lease forfeited if she attempts to do it.

My Lords, I beg to move your Lordships that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

LORD WRENBURY. My Lords, but for the fact that Astbury J. found a defence to this action, I should have thought the case unarguable. I do not know which has given me the greater surprise, the decision of the learned judge or some of the propositions with reference to terms and derivative terms of years which have been advanced by counsel at your Lordships' Bar. Happily it is not necessary to go into the latter. The case seems to me to be the very simplest.

The appellant was lessee of a house No. 27 Collingham Place under a tenancy agreement which contained a covenant not to assign or underlet or part with possession of the premises without consent, and then followed the words: "and as a condition of such consent the landlord may require the assignee to enter into an agreement with him direct to observe and fulfil all the conditions and obligations of this agreement." Your Lordships will notice that the assignee is there mentioned and the sub-lessee is not, and naturally so. The sub-lessee for a shorter term might well be called upon to agree with his sub-lessor to observe during his sub-tenancy the conditions and obligations of the superior lease (other than that for payment of the head rent), but could not

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reasonably be called upon to enter into an agreement with the lessor (with whom he has no privity) to observe and fulfil all the conditions and obligations of the principal tenancy agreement including, for instance, the obligation to pay the rent reserved by the principal tenancy agreement during the whole of the principal term. The words in question do not mention and are not addressed to the case of a sub-lessee. I set aside those words altogether as having nothing to do with the case.

Then the words with which I have to do are these: "will not assign or underlet or part with the possession of the said messuage or premises or this Agreement without the consent in writing of the Landlord for that purpose first had and obtained such consent not to be unreasonably withheld." The term granted by this lease was one of five years from March 25, 1919, expiring therefore in March, 1924. The lessee on February 14, 1920 granted a sub-lease of the third floor to one Pizer for three years from February 8, 1920. She asked and obtained the consent of her lessor to this sub-lease. On February 28, 1920, the lessee entered into another agreement for a sub-lease, and that was for a yearly tenancy of all the rest of the house in favour of one Boucher from May 1, 1920, with an option to him to continue his tenancy until the expiration of the lease. As to this latter she obtained no consent. Having thus granted an under-lease of one portion of the premises, which was the third floor, to Pizer and an under-lease of all the rest of the house to Boucher, she parted with the possession of the whole of the premises. Under these circumstances her lessor on July 5, 1921, wrote her a letter, saying, "I find that you have . . . . parted with possession of it (the house) to some one else who has ever since been in occupation. As you did not obtain or ever apply for my consent to your so doing this is a breach of the condition of your tenancy"; so that the breach that he alleged was that she had parted with the possession of the premises.

Had she parted with the possession of the premises? As I have said, she retained possession of no part at all of the

premises. She had obviously parted with the possession of the premises. I ask myself, had she parted with the possession of the premises with her lessor's consent? Answer, No. She had parted with the possession of part of the premises with his consent; she had no consent to parting with the whole of the premises. The act she had done was this—that after her second demise she had so acted as that she had parted with the whole of the premises, and she had no consent to part with the whole of the premises. In that state of things the lessor commenced his action. It is true that in his pleading he did not allege that she had parted with possession of the premises; what he alleged was that she had sub-let the whole of them. It makes no difference. What was the case as regards sub-letting? Had she sub-let the whole? Yes, she had. Had she obtained his consent to sub-letting the whole? No, she had not. She had obtained consent to sub-letting a part; she had not obtained consent to sub-letting the whole.

It is said, and said with truth, that if there be a covenant not to assign or underlet the premises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated, if those be the words, for the words "or any part thereof" are not found in the covenant. But that has no application to this case. This lady was a lessee upon terms that she should not sub-let the whole and should not part with possession of the whole without consent. Without consent to what? Without consent to sub-letting the whole or parting with possession of the whole. She has sub-let the whole without consent to sub-let the whole. She has parted with possession of the whole without consent to part with possession of the whole. A breach was committed and the lessor was entitled to re-enter.

My Lords, I think the appeal fails.

Lord Carson. My Lords, I concur with the views already expressed in the speeches of the noble and learned Lords who have preceded me, but I think the point that has to be decided is so clear and so concisely put in a passage in the judgment

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of Warrington, L.J., that I should like to read it and adopt it as my reason for deciding as I do. He says: "On the 14th February she underlet part, and on the 28th February she underlet the remainder; but the result of that is that she has underlet the whole. Has she obtained the consent of the landlord to that underletting? She plainly has not. She has obtained the consent of the landlord to the underletting of one part of it, but she has never obtained the consent of the landlord to the underletting of the whole."

Counsel having agreed that the correct date for the mesne profits to commence was October 26, 1921, the date of the commencement of the action :—

Order of the Court of Appeal varied by substituting, in paras. 4 and 5 of the said order, for the words "28th of February, 1920," the words "26th of October, 1921," and, subject to such variation, said order affirmed, and appeal dismissed with costs.

Lords' Journals, June 19, 1923.

Solicitor for the appellant: *C. E. Vaughan Williams.*
Solicitor for the respondent: *Douglas W. Money.*

[HOUSE OF LORDS.]

POSTMASTER-GENERAL . . . . . APPELLANT;

AND

CORPORATION OF LIVERPOOL . . . RESPONDENTS.

H. L. (E.)*
1923
June 22.

Telephone—Injury to Telephone Cable—Recovery of Expenses of Repair—Electric Main—Escape of Electricity—Statutory Debt—Negligence in laying Telephone Cable—Telegraph Act, 1878 (41 & 42 *Vict. c.* 76), *s.* 8.

Sect. 8 of the Telegraph Act, 1878, which provides that where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall be liable to pay to the Postmaster-General such expenses (if any) as he may incur in making good the said destruction or injury, does not apply where the destruction or injury is occasioned by the Postmaster-General's own negligence or by the negligence of those for whom by legal succession or otherwise the Postmaster-General is responsible.

Dictum of Lord Sterndale M.R. in *Postmaster-General* v. *Blackpool and Fleetwood Tramroad Co.* [1921] 1 K. B. 114, 118 commented on.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of the Divisional Court, which reversed a judgment of the county court judge at Liverpool in favour of the respondents.

Under the powers conferred on him by the Telegraph Acts, 1863 to 1916, the appellant, the Postmaster-General, owned and controlled the telephone system in this country. The respondents, the Liverpool Corporation, were the undertakers for the supply of electricity in the City of Liverpool.

The action was brought by the appellant against the respondents to recover 40*l.* 8*s.* 7*d.* damages, being the agreed cost of repairing the appellant's telephone cables, pipes and manhole, which were damaged by the escape of an electric current from a main, the property of the respondents. This sum was claimed: (1.) as damages for nuisance; (2.) under the provisions of s. 8 of the Telegraph Act, 1878, and, alternatively, (3.) as damages for negligence.

* *Present:* EARL OF BIRKENHEAD, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

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In 1889 the then Liverpool Electric Supply Company laid an electric light main along North John Street, Liverpool, and in 1896 this main was taken over by the respondents and had since been maintained by them. It was admitted that this main was properly laid.

In November, 1884, the then Postmaster-General granted to the National Telephone Company licence and permission to work and use telephones during the term of thirty-one years commencing on January 1, 1881.

By a memorandum of agreement, dated June 17, 1896, between the respondents and the National Telephone Company, the respondents consented to the exercise by the company of such of the powers of the Postmaster-General under the Telegraph Acts, 1863 to 1892, as might be conferred on the company, subject to the restrictions, limitations and conditions thereinafter contained.

Clause 15 provided: "The Company shall hold the Corporation free from liability to any claim for compensation from the Company in respect of any damage or injury to the wires or telephone system of the Company which may arise from the existence in the said streets or any of them of the electric lighting mains or services of the Corporation."

By clause 20 the Corporation had power to determine this agreement on six months' notice, but this power had not been exercised.

On November 12, 1896, the then Postmaster-General authorized the National Telephone Company to exercise within the City of Liverpool all such powers of executing works as were conferred upon the Postmaster-General by the Telegraph Acts, 1863 and 1878, and by s. 2 of the Telegraph Act, 1892. This licence would expire on December 31, 1911.

By virtue of s. 5, sub-s. 2 (*b*), of the Telegraph Act, 1892, the consent of the respondents was a condition precedent to the exercise by the company of the powers granted by this licence.

In 1903 the National Telephone Company, with the consent of the respondents, subject to the agreement of June 17, 1896, laid a telephone pipe underground in North John Street to

connect with the building of the Royal Insurance Company. This pipe was laid at right angles with and underneath the respondents' electric main.

By an indenture, dated February 2, 1905, and made between the Postmaster-General and the National Telephone Company, the Postmaster-General agreed to purchase the plant, land and buildings of the company as from December 31, 1911, free from all charges created by the company, but subject to all way leave and other rentals, contracts and burdens of every kind subject to which the company might hold the same.

By a circular letter dated February 24, 1912, addressed to the respondents the Postmaster-General informed the respondents that he had acquired as from January 1, 1912, the plant of the National Telephone Company and that such plant must be deemed to have been constructed by the Postmaster-General under the powers conferred upon him by the Telegraph Acts, 1863 to 1911, and not by virtue of any agreement made between the respondents and the National Telephone Company.

No notice was given by the Postmaster-General in accordance with the provisions of s. 4, sub-s. 2, of the Telegraph Act, 1892, asking for the withdrawal of the terms of the agreement under which the telephone pipe was originally laid.

On August 18, 1918, as the result of an explosion caused by a leakage of electric current from the respondents' cable in North John Street, the cover of a manhole belonging to the appellant was blown away and a portion of the telephone pipe was destroyed.

The county court judge found that the respondents were not guilty of negligence in not having discovered the point at which the leakage from the electric cable was taking place before the explosion; that the appellant's telephone pipe was laid in contact, or practically in contact, with the electric cable, and that such laying was improper construction and negligence, and that thereby the telephone pipe was exposed to danger to which it need not have been exposed and to which in fact it was the duty of the persons constructing the

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pipe not to expose it; and that the damage arose because the pipe was laid in this danger zone. In addition he held that the appellant continued to be bound by the agreement of June 17, 1896, between the respondents and the National Telephone Company, and in the result he gave judgment for the respondents. The Divisional Court (Shearman and Salter JJ.) reversed the decision of the county court judge and ordered judgment to be entered for the appellant for the amount of his claim.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) reversed the decision of the Divisional Court and restored the decision of the county court judge.

1923. June 21. *Sir Ernest Pollock K.C.* and *Lynskey* for the appellant. The appellant is entitled, by virtue of s. 8 of the Telegraph Act, 1878, to recover the cost of the injury done to his plant. This telephone pipe was lawfully in the road, and it was destroyed or injured, within the meaning of this Act, by the escape of electric current due to a fault in the respondents' electric light main. Therefore the protection afforded to the Postmaster-General by the Act applies. In *Postmaster-General* v. *Blackpool and Fleetwood Tramroad Co.* (1), a decision upon a similar provision in a private Act of Parliament, Scrutton L.J. says that even if any Postmaster-General were lunatic enough to put a cable on the top of a live wire the Court ought to assume that it was lawfully in the road, and the Act provides that the cost of any injury to it shall be paid by the company (i.e., in this case by the corporation). Lord Sterndale M.R. was also of opinion that it would be no answer to the claim of the Postmaster-General to prove that he had been guilty of want of reasonable care in selecting the place in which to lay his cable. The agreement of June 17, 1916, expired when the licence granted by the Postmaster-General to the National Telephone Company came to an end.

Maugham K.C., *Singleton K.C.* and *Lyon Blease* for the respondents were not called on.

(1) (1919) 84 J. P. 53, 56; [1921] 1 K. B. 114, 118.

June 22. EARL OF BIRKENHEAD. My Lords, the issues in this case require some disentanglement, but I gather that your Lordships are prepared to deal with the matter at once.

The appeal is from an order dated June 26, 1922, of the Court of Appeal setting aside an order dated November 25, 1921, of the King's Bench Division whereby it was ordered that a judgment obtained by the respondents in the Liverpool County Court should be set aside and that judgment should be entered for the appellant for the amount in dispute, a sum of 40*l.* 8*s.* 7*d.* I should myself have been almost content to leave the matter where it was left by the judgment of the learned county court judge, whose opinion reflects great credit upon himself and also upon the Bench of which he is a member, but three reasons make it proper that I should examine the matter somewhat more elaborately.

In the first place, two of the learned judges of the King's Bench Division sitting in a Divisional Court reached a different conclusion. In the second place, we are told that a decision adverse to the contention of the appellant may lead to legislative proposals, an indication which may make it useful that the justification for such proposals should receive some examination in this House. And in the third place, at least one important point of law presents itself for decision.

My Lords, under the powers conferred upon him by the Telegraph Acts, 1863 to 1916, the Postmaster-General, who is the appellant, owns and controls the telephone system in this country. The respondents are the undertakers for the supply of electricity in the City of Liverpool. On November 23, 1920, the appellant claimed from the respondents in the Liverpool County Court the sum of 40*l.* 8*s.* 9*d.*, alleging that on August 6, 1918, his telephone pipes and cable were damaged by an explosion caused by the respondents' electric cable, and he claimed such damages upon three alternative grounds: first, nuisance; secondly, under the terms of s. 8 of the Telegraph Act, 1878; and thirdly, upon the ground of negligence.

Certain facts were either proved or admitted at the trial which may be summarized so far as they remain relevant

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in the following way. By an indenture made on November 29, 1884, between the Postmaster-General and the National Telephone Company, Ld., the Postmaster-General granted licence and permission to the National Telephone Company, Ld., for a term of thirty-one years commencing from January 1, 1881, to work and use telegraphs of which the transmitting and receiving instruments should be telephones. By clause 17 power was reserved to the Postmaster-General, subject to giving a certain prescribed notice, to purchase the telegraphs of the company. By a deed dated November 12, 1896, the Postmaster-General granted authority to the company to exercise within the City of Liverpool all such powers of executing works as were conferred upon the Postmaster-General by the Telegraph Acts, 1863 and 1878. It should be noted further that by s. 9 of the Telegraph Act, 1863, no telegraph (which term by s. 3 of the Telegraph Act, 1869, includes "telephones") can be laid either by the Postmaster-General, or by a company, under the street of any city except with the consent of the body having the control of the street. In the year 1889, an electric cable was laid along North John Street, Liverpool, on behalf of the Liverpool Electric Supply Company, Ld. The cable was encased in bitumen and laid in an iron trough at a distance of 14 in. from the top of the trough to the surface of the street, parallel to and close to the kerb of the footway. The Liverpool Electric Supply Transfer Act, 1896, transferred to the respondents the undertaking of the Liverpool Electric Supply Company, Ld.

Next in order it falls to consider the terms of a memorandum of agreement dated June 17, 1896, made between the respondents and the National Telephone Company, Ld. Under the terms of that agreement the respondents consented to the exercise by the company of such of the powers of the Postmaster-General under the Telegraph Acts, 1863 to 1892, as might be conferred upon the company by the Postmaster-General under the powers of the Telegraph Act, 1892, subject to the restrictions, limitations, and conditions contained in the agreement. And at this point we are to

consider with great care the terms of clause 15 of the memorandum. That clause runs as follows: "The company shall hold the corporation free from liability to any claim for compensation from the company in respect of any damage or injury to the wires or telephone system of the company, which may arise from the existence in the said streets or any of them of the electric lighting mains or services of the corporation." On January 15, 1903, the National Telephone Company, Ld., applied to the respondents for permission to lay a telephone pipe underground in North John Street into a certain insurance building adjacent. The respondents granted the application subject to the terms of the agreement to which I have referred dated June 17, 1896, and in a letter of January 23, 1903, the National Telephone Company were duly informed that the application had been thus conditionally assented to. Pursuant to this permission the National Telephone Company in 1903 laid a telephone pipe underneath the electric cable of the respondents. The county court judge has found as a fact that the respondents were not made aware of the position relatively to the cable in which this pipe was laid.

The next instrument which requires examination in the case is a very important indenture of February 2, 1905, between the Postmaster-General and the National Telephone Company. By the terms of this agreement the Postmaster-General agreed to purchase the plant, land, and buildings of the company. Counsel for the appellant made the observation that this was not an agreement to which the respondents were parties. This is perfectly true; but it none the less illustrates the view which at that time the appellant held of his position, and the relevant clause, which is the sixth, sub-clause 2, is so important that I find it necessary to read it in extenso. "The company shall on December 31, 1911, or on such subsequent day or days during the year 1912 as may be fixed by the Postmaster-General deliver and hand over to the Postmaster-General all plant, property, and assets of the company which may be purchased by him under this agreement and upon such transfer all estates, interests, rights,

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powers, and authorities possessed or enjoyed by the company in relation thereto shall become and be deemed to be the property of and shall vest in the Postmaster-General absolutely for all the estate and interest previously enjoyed therein by the company freed from any charge or incumbrance thereon created by the company but subject to all wayleave and other rentals, contracts, and burdens of every kind subject to which the company may hold the same or which the company may be liable to pay, observe, perform, or bear in connection therewith and so far as such rentals, contracts, and burdens are continuing liabilities the Postmaster-General shall indemnify the company against the same."

It becomes necessary, though very briefly, next to examine the terms of a document which in the course of this litigation has been referred to as the circular letter, and which, dated January 24, 1912, was addressed by the Postmaster-General to the respondents. It is a somewhat remarkable, though it has ceased in this litigation to be an important, letter. At one time it was contended that it constituted a notice under s. 4, sub-s. 2, of the Telegraph Act, 1892; but this contention was abandoned in the Court of Appeal, and thereafter the letter possesses no greater importance than that it illustrates the point of view which was guiding the attitude of the Postmaster-General at an important period of the case. The letter lays down dogmatically an entirely inaccurate statement of the law, and for this statement the Postmaster-General makes himself responsible in language more suitable for the Legislature than for an individual minister. The reasons for the criticism I have thought proper to pass upon it will appear when I state the conclusions of law which I have inferred from the facts I am at the present moment sketching. The only other importance of the letter is that counsel for the appellant used the later passages of it in reinforcement of an argument to which I will more particularly refer in a moment.

My Lords, no notice was given by the Postmaster-General to the respondents asking for the withdrawal of the terms of

the agreement under which the telephone pipe was originally laid; and the pipe remained in its original condition until on August 6, 1918, the damage occurred which has led to this litigation.

The county court judge reached certain conclusions of fact. He found that there was no allegation of negligence in regard to the construction of the electric cable. He found that the respondents were not guilty of negligence in having failed to discover where the leakage from the cable was taking place before the time of the explosion. He found that the appellant's pipe was laid in actual contact, or almost so, with the cable; and that such a method of laying amounted to impropriety in construction and constituted negligence; that as the result of such negligence the pipe was exposed to unnecessary danger; and that it was the duty of the constructors to have avoided such exposure to such unnecessary danger. He found finally that the damage was occasioned and contributed to by the appellant laying the pipe in such close proximity to the electric cable as to be within the danger zone. I have greatly commended the judgment of the learned county court judge and therefore may permit myself this criticism, that on an important finding of fact, in which he had used the word "occasioned," it could lead only to obscurity that the learned judge should have added to the word "occasioned," which would appear to be a complete finding, the less definite expression "and contributed to." If one "occasions" a thing one obviously "contributes to" it.

In these circumstances, my Lords, and omitting contentions of fact which have not survived, the appellant argued that he was entitled to recover damages under the eighth section of the Telegraph Act of 1878. The relevant words in that very important section have already been read but must be repeated: "Where any undertakers, body, or person, by themselves or by their agents, destroy or injure any telegraphic line of the Postmaster-General, such undertakers, body, or person shall not only be liable to pay to the Postmaster-General such expenses (if any) as he may incur

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in making good the said destruction or injury, but also, if the telegraphic communication is carelessly or wilfully interrupted, shall be liable to a fine not exceeding twenty pounds per day for every day during which such interruption continues."

It is convenient in construing this section to notice next that Parliament has provided specific means by which the appellant could have obtained relief against any "condition or burden," subject to which consent had been given for the construction of the telegraph line; and it is important to bear in mind that he has not availed himself of this statutory resource. The section of the statute in question is s. 4, sub-s. 2, of the Telegraph Act, 1892, and it is necessary that I should read that section: "Where, either before or after the passing of this Act, any consent for the construction of a telegraphic line along a street or public road has been given, subject to any term, condition, or stipulation, to a person through whom the Postmaster-General claims, the Postmaster-General may give a notice to the authority or person giving the consent asking for the withdrawal of that term, condition, or stipulation, and if the authority or person fail to withdraw it within twenty-one days after the notice is given, a difference shall be deemed to have arisen between that authority or person and the Postmaster-General, and shall be determined in manner provided by sections four and five of the Telegraph Act, 1878." Sects. 4 and 5 of the Telegraph Act of 1878 provide a scheme of arbitration for the matters therein dealt with.

In answer to the respondents' contention that the appellant was bound by the agreement of June 17, 1896, it was argued both below and before your Lordships that that agreement expired upon the expiration of the licence granted by the appellant to the National Telephone Company, and this, my Lords, is the principal issue which requires consideration. But I deal first with the true construction of s. 8 of the Telegraph Act, 1878. Counsel for the appellant contends that this section is so widely drawn that it extends to a

case in which the destruction or injury is actually occasioned by the negligence of the Postmaster-General himself. In support of that submission he cites an observation of Scrutton L.J. in *Postmaster-General* v. *Blackpool and Fleetwood Tramroad Co.* (1) I do not agree with that observation, although the words of the private Act which fell to be construed in that case differed considerably from those of s. 8 of the Act of 1878; nor do I agree without qualification with the observation of the Master of the Rolls. The Master of the Rolls said: "It is not, in my opinion, any answer to a claim by the Postmaster-General for the company simply to show that the position of the cable was, if it were the fact, selected by him without an exercise of reasonable care and skill." The comment must be made upon that dictum that if it be additionally shown that a want of reasonable care and skill occasioned the damage, neither sub-s. 2 of s. 65 of the private Act in the *Blackpool Case* (1) nor s. 8 of the Act of 1878 in the present case has any application at all. If the appellant's contention as to the true meaning of s. 8 were accepted, it would be necessary to read into the second line of the sub-section after the word "agents" some such words as "or where the Postmaster-General himself by his own negligence." The fantastic consequences of such a construction upon the rest of the section are apparent, but it is nevertheless required by the appellant's argument. My Lords, s. 8, it cannot be too plainly stated, has no application at all to any case where the damage complained of is occasioned by the Postmaster-General's own negligence or by the negligence of those for whom by legal succession or otherwise he is answerable. This conclusion, which, as I should have thought, was elementary if it had not been questioned, when applied to the findings of fact by the county court judge would in itself have disposed of most of this case, but inasmuch as the argument below has proceeded largely upon other grounds, I think it proper that these, too, should be made the subject of a brief examination.

(1) 84 J. P. 53, 56; [1921] 1 K. B. 114, 118.

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The main contention of the respondents (for I omit the issues which have been abandoned or finally dealt with by the Courts below) is that the Postmaster-General is bound by clause 15 of the memorandum of agreement of 1896 entered into between the respondents and the company. And, indeed, why is he not so bound? It is admitted that the company could not have laid their telephone pipe without the permission of the respondents. It is established by contemporary documents that the latter would have refused such permission unless they had obtained the protection afforded by clause 15 of the agreement of 1896. It is admitted further that the Postmaster-General himself could not have laid the pipe without the respondents' licence, so that it would have been in their power to make with him also stipulations proper, and in their view indispensable, for their protection. Nor can it be doubted that they would have done so. But the Postmaster-General proposes the astonishing contention that he is at liberty, while taking advantage of the original permission, to repudiate the protective condition without which that permission would never have been given.

It is indicated that legislation may become necessary if the view of the Postmaster-General fails of acceptance in this House. I have amused myself by speculating as to its probable ambit. The first section of such a Bill will, I suppose, provide that when the Postmaster-General by his own negligence occasions damage to a telegraphic line other persons (including perhaps the owners) non-contributory to that negligence and damage shall pay for it; and the second, no doubt, will provide that when the Postmaster-General inherits from a company a laid pipe which neither they nor he could have laid down without the consent of X the Postmaster-General shall nevertheless be absolved from the condition without which his predecessors in title would never have been allowed by X to lay a pipe at all. My Lords, I shall watch with interest the Parliamentary progress of such a proposal.

I have dealt sufficiently with the first of these two points,

but the second must be somewhat elaborated. The view taken upon such a point by the Postmaster-General himself is not without interest in this connection. On February 2, 1905, he made it plain. A reference in this connection should be made to clause 6, sub-clause 2, of the agreement already referred to of that date. The Postmaster-General undertook under the terms of that clause to take over the property and assets of the company subject to all "contracts and burdens of every kind" which the company was liable to perform or bear. Is not the obligation contained in clause 15 of the agreement of June 17, 1896, "a contract or burden" within the meaning of clause 6, sub-clause 2, of the later agreement? And Parliament itself by s. 4, sub-s. 2, of the Telegraph Act, 1892, which I have already set out, has plainly shown that it contemplates the survival of conditions binding in such cases upon the Postmaster-General's predecessors in title and provides a statutory mode of discharging them. The section plainly shows that the Postmaster-General would otherwise be bound (as indeed he ought to be) by the terms of the agreement. The only answer attempted by the appellant was that the agreement of June 17, 1896, ceased to operate after December 31, 1911, because the licence was not thereafter renewed. There is neither force nor fairness in this contention. The agreement contains no limitation in point of time, and, as Atkin L.J. points out in his judgment, certain clauses, and notably clauses 17 and 18, regulate the relations of the parties that may exist (that almost certainly will exist) after the termination of any licence, in respect of injury to the lines left in situ in the course of removal or otherwise. And in this connection s. 6 of the Telegraph Act, 1868, was greatly, and, I think, rightly, relied upon in the Court of Appeal. But my judgment is not based upon this section and its effect was not in this House elaborately argued by Sir Ernest Pollock. My judgment proceeds upon broader grounds. The Postmaster-General inherits an advantage and a burden. Had he continued the licence to the company the latter would have continued to enjoy the one and to support the other. I know of no consideration of law or equity

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which entitles the Postmaster-General suo motu by withholding the licence to transfer the advantage to himself while repelling the correlative burden. My Lords, I think it necessary to add that the present is an absolutely hopeless appeal without merit in fact or foundation in law; and I greatly regret that the Postmaster-General did not leave the matter where it rested after the admirable judgments delivered in the Court of Appeal.

I move that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, I entirely concur, and have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely concur. I wish to say in particular that I agree fully also with the noble earl's observations with regard to the precedent, or alleged precedent, of the *Blackpool Case*.

I would only add, before I sit down, that I struggled hard during the discussion here to ascertain what was the point of this case which raised the general principle desired by the Postmaster-General for use as a test by his department in the other cases which were said to be numerous. I should have thought each case of this kind depended upon its own particular facts. But after some effort on my part, the learned counsel for the appellant said that the general principle which he desired to have declared in this House was as to the scope of s. 8 of the Telegraph Act of 1878.

My Lords, on its facts the present case, shortly put, is a case in which this explosion occurred, not by anything done by the Corporation of Liverpool, but by the act and conduct of the predecessor in title of the Postmaster-General himself. In those circumstances it is proposed to construe s. 8 as permitting the Postmaster-General to saddle with the cost of that explosion not himself who bears the burdens of his predecessor in title, through whose fault it occurred, but the respondents, through whose fault it did not occur.

My Lords, in the ordinary relations of men, the proposal

would be monstrous, and if carried into practice would of course plainly be a tyrannical and unjustifiable act. I can understand, however, a department or its advisers maintaining that the sections of an Act of Parliament which they have to administer are such that they, the department, have no option but to do this monstrous thing, and when it is challenged put their powers and duties under the Act to the test of a legal decision. My Lords, I have read with much care the decision of the Court of Appeal; it is one of great analytical accuracy. It emphatically negatived the suggestion that s. 8 of the Telegraph Act of 1868 gave any cover or warrant for conduct of the kind described, or for the claim put forward. I think the Postmaster-General's department might have been well content to stop there and to consider itself relieved from what must have been to it the odious duty of endeavouring to support by statute what would otherwise be, as I have stated, tyrannical and unjustifiable conduct. They have not chosen that course, my Lords, and they come here because it is a test case. My answer, in full agreement with the county court judge and the Court of Appeal, is that the claim and all other claims of which this is a test or sample have no support whatsoever under s. 8 properly construed.

Lord Wrenbury. My Lords, I agree, and I desire to add that I entirely concur in that which has been said by the noble and learned Lord on the Woolsack as to the action of the Postmaster-General in bringing this appeal before your Lordships' House.

Lord Carson. My Lords, I also concur, and I should like to add that, in my opinion, when once the county court judge had found the facts, which are not challenged, and which could not be challenged, in these proceedings, I think it is regrettable that the Postmaster-General proceeded with the litigation.

My Lords, the respondents were relieved by the findings of the county court judge from all negligence on their part. On the other hand, the Postmaster-General, or rather his

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predecessors, under whom he claimed, were found guilty of improper construction which amounted to negligence whereby the telephone pipe was exposed to danger which caused the loss in question. I think, my Lords, to attempt to apply s. 8 of the Telegraph Act of 1878 to such a state of facts as that requires a boldness and a hardihood of construing the Act in the support of what was wrong, which has seldom, in my opinion, been surpassed in a Court of Justice.

My Lords, it seems to me as if the appellant desires to lay down that not only is the Postmaster-General, by which I mean of course his department, incapable of doing wrong, but that if he does commit a wrong, whereby damage occurs, he ought to ask somebody else to pay for it.

I agree, my Lords, that this appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 22, 1923.

Solicitor for the appellant: *Solicitor to the Post Office.*

Solicitors for the respondents: *F. Venn & Co., for Walter Moon, Town Clerk, Liverpool.*

[HOUSE OF LORDS.]

SECRETARY OF STATE FOR HOME AFFAIRS . . . . . } APPELLANT;

AND

O'BRIEN . . . . . RESPONDENT.

H. L. (E.)*
1923
May 14;
July 9.

Habeas Corpus—Order directing issue of Writ but not directing Discharge of Applicant—Determination of the Applicant's Right to Liberty—Right of Appeal—Appeal to House of Lords—Competency—Appellate Jurisdiction Act, 1876 (39 & 40 *Vict.* c. 59), *s.* 3.

No appeal lies from an order of a competent Court for the issue of a writ of habeas corpus where the Court determines the illegality of the applicant's detention and his right to liberty, although the order does not direct his discharge.

Upon the application of a man whom the Home Secretary had caused to be arrested and deported to Dublin, where he was interned by the Government of the Irish Free State, the Court of Appeal, reversing the decision of the Divisional Court, granted an order nisi, which they subsequently made absolute, for the issue of a writ of habeas corpus directed to the Home Secretary, the Court holding that the detention was illegal as the Home Secretary had no power to order a person to be interned in the Irish Free State; and, owing to a doubt whether the Home Secretary had control of the body, the order allowed him a week within which to make his return to the writ. Before the week had elapsed an appeal by the Home Secretary to the House of Lords was heard on the question of competency:—

Held (by Earl of Birkenhead, Viscount Finlay, Lord Dunedin, and Lord Shaw of Dunfermline; Lord Atkinson dissenting), notwithstanding the generality of the language of s. 3 of the Appellate Jurisdiction Act, 1876, that the House had no jurisdiction to entertain the appeal.

Cox v. *Hakes* (1890) 15 App. Cas. 506 applied.

Barnardo v. *Ford* [1892] A. C. 326 distinguished.

Appeal dismissed as incompetent.

APPEAL from an order of the Court of Appeal. (1)

On March 11, 1923, the Home Secretary, purporting to act under reg. 14 B of the Defence of the Realm Consolidation Regulations as applied to Ireland by an Order in Council of August 13, 1920, made in pursuance of the powers conferred in that behalf by the Restoration of Order in Ireland Act, 1820, caused the respondent to be arrested in London and

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1923] 2 K. B. 361.

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deported to Dublin, to be interned in the Irish Free State in such place as the Government of the Irish Free State should direct, and the respondent had since been interned in Mountjoy Prison.

On April 10, 1923, the respondent applied ex parte to a Divisional Court for an order nisi for a writ of habeas corpus directed to the Home Secretary.

The Divisional Court (Lord Hewart C.J., Avory and Roche JJ.) refused the application.

On April 13, 1923, the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) granted the order nisi, and on May 9, 1923, the Court made the order absolute.

The Court held (1.) that the effect of the passing of the Irish Free State Constitution Act was to deprive the Home Secretary of any power to order the internment of any person in the Irish Free State, inasmuch as any person so interned would not be under his control; (2.) that, though the Home Secretary had lost the legal control of the respondent, he had not necessarily lost the de facto control, and that the rule should be made absolute in order to compel him to make a return to the writ.

By the order of the Court the Home Secretary was allowed until May 16 within which to make his return to the writ. The Home Secretary having appealed against this order, an application to the House was made on his behalf, with the consent of the respondent, to expedite the hearing of the appeal and, in view of the urgency of the matter, the House ordered the appeal to be heard on May 14.

May 14. *Sir Douglas Hogg A.-G.* (with him *Sir Thomas Inskip S.-G.* and *Giveen*) for the appellant.

[The EARL OF BIRKENHEAD suggested that the most convenient course would be to hear the question of the jurisdiction of the House to entertain the appeal before hearing the appeal on the merits.]

On the question of jurisdiction there are decisions as to the jurisdiction of the Court of Appeal to entertain an appeal against an order for a writ of habeas corpus, but there is no

authority as to the jurisdiction of your Lordships' House to entertain such an appeal. That question turns upon the Appellate Jurisdiction Act, 1876, s. 3, which enacts, subject to certain exceptions which do not apply, that an appeal lies to the House of Lords from any order of the Court of Appeal in England. That language is wide enough to include the present appeal. The leading cases as to the jurisdiction of the Court of Appeal are *Cox* v. *Hakes* (1) and *Barnardo* v. *Ford*. (2) In *Cox* v. *Hakes* (1), where the Queen's Bench Division made an order for the discharge of the prisoner under the writ, it was held by this House that the Court of Appeal had no jurisdiction to entertain the appeal on the ground that the order on the appeal, if it succeeded, would be abortive, as the Court had no power to rearrest a person who had been discharged from the custody of the law under a writ of habeas corpus. But the House expressly left open the question whether an appeal would have lain if there had been no order for the discharge of the prisoner. In *Barnardo* v. *Ford* (2) this House held that the Court of Appeal had jurisdiction to entertain an appeal from an order making absolute a rule for a writ of habeas corpus where the applicant for the writ had not been discharged. That turned upon s. 19 of the Judicature Act, 1873, but s. 3 of the Appellate Jurisdiction Act, 1876, is framed in equally wide language, and if the Court of Appeal has jurisdiction to entertain an appeal from such an order so also has this House. This case is governed by *Barnardo* v. *Ford*. (2) [He also referred to *Reg.* v. *Barnardo Jones's Case* (3); and upon the question of the validity of reg. 14 B to *Rex* v. *Halliday* (4) and *Brady* v. *Gibb*. (5)]

Patrick Hastings K.C. (with him *St. John Field, Richard O'Sullivan* and *G. Ansley*) for the respondent. The *Barnardo* cases raise rather a special point, because in those cases the child had to be in the custody of somebody, and the only question was who was the proper person to have the

(1) 15 App. Cas. 506.
(2) [1892] A. C. 326.
(3) [1891] 1 Q. B. 194; [1891] A. C. 388.
(4) [1917] A. C. 260.
(5) (1921) 37 Times L. R. 975.

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custody. Those are not cases affecting the liberty of the subject in the ordinary sense, and are therefore distinguishable. On the other hand, the decision of this House in *Cox* v. *Hakes* (1) was placed on a much wider basis than that suggested by the Attorney-General and really governs this case. It did not turn simply on the question of the discharge of the prisoner. The test is, as is shown particularly by the language of Lord Halsbury, whether the legality or otherwise of the imprisonment has already been determined. If the Court definitely decides that the detention is illegal then no appeal lies, whether the prisoner has been discharged or not. The essential feature of the procedure of habeas corpus is the immediate determination of the prisoner's right of freedom. In this case all the Lords Justices have decided that the detention of the respondent was illegal and he would now have been discharged were it not for the doubt whether the Home Secretary had power to bring up the body. If he had had control of the body the order of discharge would have followed ex debito justitiæ. In a matter affecting the liberty of the subject such as habeas corpus, if your Lordships are of opinion that there has been a clear decision entitling the respondent to his liberty no effect should be given to an argument based upon the strict terms of the order.

Sir Douglas Hogg A.-G. in reply. It is not true to say that the discharge of the prisoner is the automatic result of the Court's holding that the custody was illegal; it is the automatic result of the Court's so holding when the return is made. The issue of the legality of the custody is now, as always, determined on the return to the writ. In every case in which the jurisdiction of an appellate tribunal is invoked it is inadmissible to rely on the reasoning of the Court below in coming to their conclusion. This is illustrated by *Rex* v. *Governor of Brixton Prison*. (2) The question now under consideration, which was expressly left open in *Cox* v. *Hakes* (1), was definitely decided in *Barnardo* v. *Ford*. (3) In

(1) 15 App. Cas. 506. (2) [1910] 2 K. B. 1056, 1071.
(3) [1892] A. C. 326.

that case the Court of Appeal had decided that the detention was illegal and there also a question was raised whether Dr. Barnardo had the custody of the child. It is impossible to hold that this House has no jurisdiction to entertain this appeal without overruling that decision.

[At the conclusion of the arguments their Lordships consulted in private. On counsel being called in :—

EARL OF BIRKENHEAD said that the majority of their Lordships had formed the opinion that in a matter such as the present no appeal was competent to this House. Their Lordships would give their reasons for that conclusion in due course.]

1923. July 9. EARL OF BIRKENHEAD. My Lords, the facts in this case need no elaborate examination, inasmuch as the only question to be decided by the House is whether or not in the circumstances of the case an appeal is competent at all.

I have no doubt that in a matter like the present your Lordships have no jurisdiction to hear such an appeal. I confine myself, therefore, to such a brief statement of the facts as is necessary to illustrate and render intelligible the motion which I shall hereafter propose.

On March 11, 1923, the respondent O'Brien was arrested at the instance of the Home Secretary; was conveyed to Liverpool and thence to Dublin, where he was handed over to the authorities of the Irish Free State, who immediately confined him in Mountjoy Prison.

Your Lordships are not, in the view which I have formed, authorized to examine the arguments in law by which, in the Courts below, the Attorney-General attempted to justify these proceedings. I do not, therefore, even attempt an examination of the true consideration of s. 1 of the Restoration of Order in Ireland Act, 1920; indeed, having regard to the view which I understand the majority of your Lordships have formed, the last authoritative word upon that section has been uttered by the Court of Appeal. This consideration, of course, makes it equally unnecessary to examine the ambit or

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authority of reg. 14 B. It is merely necessary to take notice of the fact that it was in reliance upon this regulation that the Home Secretary directed the apprehension and deportation of the respondent.

Nor are we concerned, if the view which I have formed is well founded, with the various constitutional provisions which brought into being the Irish Free State. These instruments, whether conventional or statutory, are only material in relation to the merits of the controversy; and with those merits I have already made it plain that we have nothing to do. Your Lordships are, however, most deeply concerned with the question whether or not this House has jurisdiction to re-examine, and if necessary to set aside upon the merits of the question, the decision which the Court of Appeal reached and announced on May 9, 1923. In this connection the following points of time must be distinguished.

On April 10, 1923, a Divisional Court, consisting of Lord Hewart C.J., Avory and Roche JJ., refused the respondent's ex parte application for a rule nisi for a writ of habeas corpus to be directed to the Home Secretary.

The Court of Appeal, differing from the Divisional Court, ordered a rule nisi to issue on April 13, 1923, and on May 9 made the rule absolute. It could not, however, direct positively the discharge of the respondent because the Home Secretary declared on affidavit that he had parted with control over his body. It is attempted in the present appeal to test and to challenge the propriety of the order made by the Court of Appeal.

When the hearing of the case before your Lordships commenced, I thought it proper to suggest that the question of jurisdiction should first be decided. The debate which followed was thereupon limited to this topic. It soon followed that in the opinion of the House no jurisdiction existed to hear the appeal. In these circumstances nothing was to be gained by an academic discussion on the merits of the matter. For, having regard to the view which a majority of your Lordships had formed upon the preliminary question, we should evidently have been debarred from even expressing

an opinion upon the merits, however protracted and conscientious our application to so interesting a topic might have been. Your Lordships therefore thought it proper to announce forthwith the conclusion that an appeal was not competent, while postponing a full exposition of the reasons which rendered this conclusion necessary.

I propose shortly to state the grounds which convinced me of the soundness of your Lordships' decision. And I am bold enough to say plainly that, had it not been for the view taken by one of your Lordships, I should have thought the matter too plain for argument. The determining considerations are partly general and partly particular. The first class is deeply involved in the history of the matter. We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. This writ, however, was one of many. Thus there was a writ of ad respondendum, ad satisfaciendum, ad prosequendum, ad testificandum, and ad deliberandum. All these writs exhibited many features in common; but the most characteristic element of all was their peremptoriness. To-day the substitution of more modern remedies has left the writ ad subjiciendum, more shortly known as the writ of habeas corpus, in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to

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any superior Court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from Court to Court until he reaches the highest tribunal in the land. If I am right in treating these rules as familiar and well settled, some curiosity may be felt as to the grounds which led the present appellant, advised as he has been by the law officers of the Crown, to assume that an appeal lay to this House in the circumstances of the present case. The argument is, of course, founded upon the very wide language of s. 3 of the Appellate Jurisdiction Act, 1876, which is undoubtedly general enough to cover this or almost any other case. It is certainly true that in terms the words are wide enough to give an appeal in such a matter as the present. But I should myself, if I approached the matter without the assistance of the authority at all, decline utterly to believe that a section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right. But happily we are in a position to approach the matter with even greater confidence, for in *Cox* v. *Hakes* (1) a very similar matter was debated and decided by this House. The argument in that case depended on the language of s. 19 of the Supreme Court of Judicature Act, 1873, but this section was in its statement of competent appeal as sweeping as s. 3 of the Appellate Jurisdiction Act, 1876. The guidance and the authority of the decision upon the earlier Act are therefore fully available for our purposes in the present appeal. It was established and indeed very often repeated in the learned judgments which were delivered in *Cox* v. *Hakes* (1) that if upon the return to the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought in question. Lord Halsbury L.C. summarized the matter in the following sentence (2): "It is the right of personal freedom in this country which is in debate; and I for one should be very

(1) 15 App. Cas. 506. (2) 15 App. Cas. 522.

slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

All the judgments in the case will repay study; but while they illustrate and elaborate the conclusion so lucidly declared by Lord Halsbury, they do not perhaps add anything which is material to our present purpose. It follows, therefore, from *Cox's Case* (1) that no appeal lies to the Court of Appeal where discharge has been ordered: and the language of the relevant statutes being for the present purpose indistinguishable, it equally follows by parity of reasoning that no appeal lies in the present matter to the House of Lords, unless upon some ground of principle the present case can be distinguished from *Cox's Case*. (1)

The Attorney-General attempted to establish such a distinction in a very singular manner. He admitted to me first that, had O'Brien been discharged on May 9 by the order of the Court of Appeal, the matter would not have been further appealable. He admitted in the second place that he could suggest no reason which would have led the Court of Appeal to withhold his discharge on May 9, except the fact that the Home Secretary no longer had the body of the respondent in his custody, having (according to the view of the Court of Appeal) illegally handed O'Brien over to the authorities of the Irish Free State. Your Lordships will now be in a position to appreciate the full simplicity and attractiveness of the Attorney-General's argument. Had the Home Secretary contented himself with one act of illegality—namely, the forcible internment within this country of the respondent—it is admitted that discharge would have been automatic, and consequently that there could have been no appeal. But inasmuch (such is the argument) as the Home Secretary has added a second illegality to the first—namely,

(1) 15 App. Cas. 506.

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by forcibly handing over the respondent to the Government of the Irish Free State—he has thereby disabled the Court of Appeal from effectively ordering his discharge, so that the respondent, because there were two illegalities instead of one, is deprived of his ancient constitutional privilege. The argument, my Lords, is one of the most remarkable which I have either heard or read from the lips of the Executive in attempting to pronounce upon the liberty of the subject. A dog is still limited to a single bite. The Home Secretary, more happily provided for, can obtain an appeal, otherwise denied him, by two.

Nor does the matter end there. The Court of Appeal appointed May 16 as the date on which the return was to be made. Before that day a request by consent was made to your Lordships to expedite the matter in view of its importance. Your Lordships were indulgently pleased, having regard to the importance of the issue, to assent to this application, so that it was actually disposed of before May 16. When the request was addressed to this House, no warning was given to your Lordships that an assent thereto might easily arm the Executive with a right of appeal which otherwise it very obviously did not possess. In the course of the argument before your Lordships, counsel for the respondent became somewhat tardily aware of the disadvantageous position into which he had allowed himself to be manœuvred; and he therefore invited your Lordships to postpone the conclusion of the debate until the Court of Appeal had disposed of the matter on May 16. Had no other method presented itself of securing for the respondent what I hold to be an established constitutional protection, I should have been disposed to recommend an assent to this request. But the view which your Lordships had formed rendered the adoption of such a course unnecessary. For your Lordships were clearly of opinion that when Lord Halsbury laid it down that the discharge of him who sued for the writ denied any further appeal to the Executive, common sense, the reason of the thing, and the very spirit of our Constitution, asserted the same consequences as

inevitable when the Court was precluded for any reason from actually directing discharge, but contented itself by laying it plainly down that the man was in law entitled to be discharged. It would indeed be a strange and repellent doctrine if we were to hold that the competency of appeal in such a matter depended neither upon a principle of law nor upon anything in the power either of the applicant to do or of the Court to direct, but upon some disability which the Executive could, if it chose to do so, create in methods infinitely various.

It remains only to distinguish *Barnardo* v. *Ford* (1), though, indeed, that decision affords no guidance in the wholly different circumstances of the present case. It is true that in that case the Queen's Bench Division made absolute an order for the issue of the writ: it is true that the Court of Appeal affirmed that order, and that this House sustained that affirmation. But in that case no question of merit was decided at all. One of the parties desired a return to the writ, in order that upon a return further questions of evidence might be raised. All that this House decided was that in the circumstances of that case there ought to be further inquiry in order to ascertain beyond all doubt whether the child was or was not still under Dr. Barnardo's control. The process, in other words, in that case was resorted to, not to ascertain any right, but to obtain remedy for the wrong caused by parting with the child's custody. Lindley L.J. (2) put the matter with his usual clearness: "But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes*. (3) That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child."

My Lords, in moving, as I do, that this appeal be dismissed,

(1) [1892] A. C. 326.
(2) *Reg.* v. *Barnardo. Jones's Case* [1891] 1 Q. B. 194, 209–10.
(3) 15 App. Cas. 506.

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I cannot refrain from expressing my satisfaction that the lacuna, if there was one, in the decision in *Cox's Case* (1), has been happily filled by the present decision in a manner which effectively carries out the evolutionary development of the constitutional liberty of the subject.

VISCOUNT FINLAY (read by EARL OF BIRKENHEAD). My Lords, the question is whether your Lordships' House has jurisdiction to hear this appeal.

The Restoration of Order in Ireland Act, 1920, became law on August 9, 1920, and by s. 1, sub-s. 1, of that Act it was provided that His Majesty in Council may issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland.

By an Order in Council dated August 13, 1920, made in pursuance of the said Act, it was provided that the Defence of the Realm Regulations then operative should, subject to certain modifications, apply and be regulations under the said Act. One of these regulations so applied and modified was Regulation 14 B, which provides for the internment, by order of the Secretary of State, of any person suspected of acting or being about to act in a manner prejudicial to order in Ireland.

On March 7, 1923, the Secretary of State made an order that the respondent, Mr. Art O'Brien, should be interned in the Irish Free State in such place as the Irish Free State Government may determine.

On April 10, 1923, application was made ex parte on behalf of the respondent, Mr. Art O'Brien, to a Divisional Court for a rule nisi for a writ of habeas corpus directed to the Secretary of State. The Court refused the writ, but on April 13, 1923, the following order was made by the Court of Appeal :—

"IN THE COURT OF APPEAL.

"ON APPEAL FROM THE HIGH COURT OF JUSTICE.

"KING'S BENCH DIVISION.

"Friday the 13th day of April, 1923.

"ENGLAND.—Upon reading the affidavit of Art O'Brien

(1) 15 App. Cas. 506.

and the several exhibits therein referred to it is ordered that Monday the 23rd day of April instant be given to His Majesty's Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue directed to him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf.

"Upon notice of this order to be given to His Majesty's Secretary of State for Home Affairs in the meantime."

On May 9, 1923, after argument for the Secretary of State and for Mr. Art O'Brien, the Court of Appeal made the following order:—

"IN THE COURT OF APPEAL.

"ON APPEAL FROM THE HIGH COURT OF JUSTICE.

"KING'S BENCH DIVISION (ENGLAND).

"Wednesday the 9th day of May 1923.

"Upon reading the affidavit of the Right Honourable William Clive Bridgeman and upon hearing Mr. Attorney-General of Counsel for His Majesty's Secretary of State for Home Affairs and Mr. Hastings of counsel for Art O'Brien It is ordered that a writ of habeas corpus do issue directed to His Majesty's Secretary of State for Home Affairs commanding him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf And it is ordered that the said Secretary of State for Home Affairs be allowed until the 16th day of May instant within which to make his return to the said writ.

"With liberty to apply,

"BY THE COURT."

The case filed on behalf of the Secretary of State on this appeal contains the following statements with regard to the

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proceedings in the Divisional Court, and in the Court of Appeal :—

"The King's Bench Division overruled the contentions of the respondent for reasons which are fully set out in the judgment of the Lord Chief Justice to which the appellant respectfully craves leave to refer.

"The Court of Appeal held that the effect of the enactment of the Irish Free State Constitution Act was to deprive the appellant of any power to order the internment of any person in the Irish Free State because it was a necessary incident of any valid order of internment that the interned person should remain under the control of the appellant, and the effect of the Irish Free State Constitution Act was to prevent any person interned in the Irish Free State from being under his control.

"Lord Justice Atkin further held that the form of the order was bad, and that the effect of the Orders in Council of the 27th of March 1923 and the 21st of April 1923 was to render any order of internment in the Irish Free State invalid. Lord Justice Bankes expressed no opinion on these two points, and Lord Justice Scrutton held the said Orders in Council to be ultra vires and invalid. The Court further held that although the appellant had lost the legal control of the respondent so as to render the order of internment bad, he had not necessarily lost the de facto control, and that the rule should be made absolute in order to compel him to make a return to it."

It is therefore clear that the ground on which the Court of Appeal made the rule absolute was that the order of internment was invalid.

Under these circumstances is the present appeal competent ? In my opinion this question must be answered in the negative.

In *Cox* v. *Hakes* (1) the Rev. Mr. Cox had been arrested under a writ de contumace capiendo. A rule nisi for a habeas corpus was obtained on the ground that the arrest was illegal. The Queen's Bench Division (Lord Coleridge C.J. and A. L. Smith J.) made the rule absolute. The Court of Appeal reversed this decision, holding that s. 19 of the Supreme

(1) 15 App. Cas. 506.

Court of Judicature Act, 1873, gives an appeal from orders made on application for habeas corpus, whether the order granted or refused the writ, and decided that the writ de contumace capiendo had been lawfully issued. On appeal to the House of Lords the decision of the Court of Appeal was set aside on the ground that where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal from the order.

The Attorney-General on the present appeal argued that the decision in *Cox's Case* (1) was distinguishable from the present, inasmuch as there had been an order of discharge in the Queen's Bench Division, and Mr. Cox had been actually discharged under that order, while in the present case the rule for a habeas corpus had merely been made absolute without any order of discharge or any actual discharge. It was argued that the decision in *Cox's Case* (1) proceeded really upon the ground that there was no machinery for rearrest, when discharge had once taken place on habeas corpus, and that it was therefore inapplicable to the present case, where there had been no discharge.

I agree that the decision in *Cox's Case* (1) does not in terms apply to the present case, but the question remains whether on principle the two cases stand on the same footing.

Lord Herschell, in *Cox's Case* (2), said: "It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here." The point now arises and it must be determined. In my opinion when the substance of the thing is looked at it is plain that there is no real difference between the two cases, and that the order of the Court of Appeal that a writ of habeas corpus do issue directed to the Secretary of State commanding him to have the body of Art O'Brien before the Court of Appeal is no more appealable than the order of discharge itself if it had been made upon the return.

The Court of Appeal had decided that the detention was

(1) 15 App. Cas. 506. (2) 15 App. Cas. 536.

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illegal, and it was on this ground, and on this ground only, that the order for the issue of the writ was made.

The writ of habeas corpus is a writ of right; it is not, however, grantable as of course, but on probable cause for it being shown: *Hobhouse's Case.* (1) To avoid the inconvenience of unnecessarily bringing up the body, possibly from a distance, the practice grew up of having a rule nisi for the issue of the writ. The present practice is stated in rr. 217 and 218, which will be found in Short and Mellor's Practice of the Crown Office, 2nd ed., p. 320. These rules are as follows:—

"R. 217.—If made to the Court, the application shall be by motion for an order, which if the Court so direct may be made absolute ex parte for the writ to issue in the first instance; or if the Court so direct they may grant an order nisi."

"R. 218.—If made to a Judge he may order the writ to issue ex parte in the first instance, or may direct a summons for the writ to issue."

On the rule nisi the case is argued upon the merits, and if the Court holds the detention illegal there is a rule absolute for the issue of the writ and the body is brought up and discharge ordered. Under the old practice the writ issued on an ex parte application and the matter was disposed of at once. It would be strange if proceeding by rule nisi gives an appeal when if it were issued on an ex parte application there would be none.

The matter was really disposed of in the present case when the Court of Appeal delivered judgment to the effect that the order of internment was invalid. O'Brien was entitled to his discharge and a custody which the Court had declared to be illegal could not properly be continued for any time beyond that which was necessary for carrying through the formal proceedings culminating in the order for discharge.

The Court of Appeal in its order of May 9 fixed May 16 as the date on which the return was to be made. It was conceded in argument at your Lordships' Bar that when

(1) (1820) 3 B. & Al. 420.

that day arrived O'Brien would be entitled to his discharge. Mr. Patrick Hastings on behalf of O'Brien during the argument asked that the case in the House of Lords should be adjourned until after that date, and if this had been granted he would have been discharged from custody and the appeal of the Secretary of State would be purposeless, as the man would be at liberty, and, as was shown in *Cox's Case* (1), there would be no process available for having him remanded into custody. Indeed it was only the fact that the hearing of the appeal to the House of Lords had been expedited by consent, so that it came on before May 16, that made it possible for the Secretary of State to raise this argument. I cannot think that there is any substance in it.

We must deal with the substance of the matter. When it has been decided that the detention of any person is illegal he is entitled to be discharged, and I do not think that a detention which ex hypothesi would be unlawful could be relied upon for the purposes of supporting a right of appeal. The Court of Appeal granted the delay of a week for the return to the writ of habeas corpus. We must, however, I think, look at this case as if O'Brien had been set at liberty, which was his right according to the judgment which the Court of Appeal had just pronounced.

The Attorney-General in his argument for the Secretary of State relied upon the decision of the House of Lords in *Barnardo* v. *Ford*. (2) In my opinion that case bears no analogy to the present. It was a case in which the mother claimed to have the custody of her boy. The boy had been in one of Dr. Barnardo's Homes but had been sent to Canada. The issue of a writ of habeas corpus had been ordered by the Queen's Bench Division and affirmed by the Court of Appeal. The House of Lords held that the case was one in which an appeal lay under s. 19 of the Supreme Court of Judicature Act, 1873, from the Divisional Court to the Court of Appeal, and itself entertained an appeal from the Court of Appeal and held, affirming their order, that, without expressing any opinion as to the circumstances under which the child was

(1) 15 App. Cas. 506. (2) [1892] A. C. 326.

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sent to Canada, the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ in order that the facts might be more fully investigated. There had been in that case no adjudication that the person was entitled to be discharged and no objection to the appeal was possible on any such ground as that which arises in the present case.

The distinction between cases such as the present and cases such as *Ford's Case* (1) was very clearly stated in the Court of Appeal in *Reg.* v. *Barnardo.* (2) Lord Esher M.R. said: "The procedure" (habeas corpus) "generally and originally has been used for the purpose of bringing up persons whose liberty was alleged to be actually interfered with; but the writ has also always been used with respect to the custody of infants, in order to determine whether the person who has the actual custody of them as children shall continue to have the custody of them as children. In such cases it is not a question of liberty, but of nurture, control, and education." It was accordingly held that the decision in *Cox's Case* (3) had no application to such cases as to infants. Lindley L.J. expressed himself in similar terms. "But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes.* (3) That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child." Lopes L.J. expressed himself to the same effect.

In my opinion this House has no jurisdiction to hear this appeal.

LORD DUNEDIN. My Lords, the generality of expression of a clause which gives an appeal from a Divisional Court to the Court of Appeal is indistinguishable from the generality

(1) [1892] A. C. 326. (2) [1891] 1 Q. B. 194, 204, 209–10, 214.
(3) 15 App. Cas. 506.

of the clause which gives an appeal from the Court of Appeal to this House. It follows that the considerations urged in the case of *Cox* v. *Hakes* (1), which case decided that appeal was not competent, are equally applicable when the question is whether appeal in such a case as the present lies from the Court of Appeal to this House.

The appellant, the Attorney-General, pointed out that in *Cox* v. *Hakes* (1) there had been an order for discharge, and discharge had followed thereon, whereas in this case no such order has been pronounced, and he contended that that fact made all the difference. In other words, he urged that it was only the absence of power in the Appellate Court to re-arrest that led to the conclusion that appeal was impossible. My Lords, on the best consideration I have been able to give on a question admittedly important, I have come to the conclusion that the case of *Cox* v. *Hakes* (2) depended on a broader ground: to wit, that it is a cardinal principle of the law of England, ever jealous for personal liberty, that when once a person has been held entitled to liberty by a competent Court there shall be no further question.

It was pointed out by Lord Halsbury that in the older practice under habeas corpus it was allowable for a person seeking his liberty to apply to successive Courts of competent jurisdiction undeterred by previous refusals; but that if he once succeeded in obtaining a judgment in favour of liberty that judgment could no longer be called in question. "The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom." Lord Herschell, in the course of his opinion, said: "A person detained in custody might thus proceed from Court to Court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question." The expression, be it observed, is "entitled to be discharged," not "actually discharged."

And again: "It is sufficient to say that no person could

(1) 15 App. Cas. 506. (2) 15 App. Cas. 517, 527, 528.

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be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful."

My Lords, if that is the true test it seems to me to follow that the mere fact that actual discharge has not taken place does not affect the question. The right to an order for discharge and discharge itself are only the corollaries of the judgment that the applicant is entitled to liberty. Under the older practice the question in its present form could not have arisen. The writ being issued ex parte, and as a matter of course, any question as to the liability of the person on whom the writ was served to bring up the body must, if raised, have been decided first, and that being settled against him there could then have been debated the question of the legality of the detention, with the immediate consequence of discharge in the case that illegality was found. It is not to be considered likely that the change of procedure involved in proceeding by way of rule nisi—a change introduced merely to obviate the unnecessary inconvenience and expense of bringing up the body—should entirely alter the general doctrine and give an appeal where none existed before.

If the general principle be as I have stated, the case of *Barnardo* v. *Ford* (1) presents no difficulty. In that case no question had ever been raised, or was ever intended to be raised, as to the legality of detention. The sole question was as to whether the writ was directed against the proper person. The result of granting an appeal was only to allow of further consideration of that question, not to reraise a question of legality which had been already determined. The decision, therefore, in no way contravenes what I have ventured to call the cardinal principle of the English law, that a person once found entitled to liberty should not be liable to have that determination again called in question.

I am therefore of opinion that it should be decided that the appeal is incompetent.

LORD ATKINSON. My Lords, an ex parte application having been made to the King's Bench Division for an order calling

(1) [1892] A. C. 326.

on the Home Secretary to show cause why a writ of habeas corpus should not be issued directing him to have before that Court the body of one Art O'Brien, whose address was given at length, cause was subsequently shown by an affidavit of the Home Secretary setting forth ground why this writ should not be issued. On April 10, 1923, judgment was delivered by the King's Bench Division refusing the application. An application precisely in the form of an original application grounded upon the same affidavit of the respondent on which the application to the Court of King's Bench Division had been grounded, or if not actually the same affidavit an affidavit to the same effect asking practically for the same relief as was asked for from the King's Bench Division, was made to the Court of Appeal, as if that Court had original, not merely appellate, jurisdiction in the matter. [His Lordship read the orders of the Court of Appeal of April 13, 1923, and May 9, 1923, already set out in Lord Finlay's judgment, and continued:] It will therefore be observed that by this order of May 9 the respondent obtained the relief he asked for; all he asked for was an order on the Secretary of State to show cause why a writ of habeas corpus should not issue to him to bring up the body of the respondent. The order of May 9 is an order absolute commanding the Home Secretary to do that very thing. Yet the applicant now argues, through his counsel, that the Court of Appeal had no jurisdiction to give to him the very relief he asked for. This order and none other is the order appealed from to this House. It seems to me in regular form. It discloses no defect upon its face, and was, apparently, such an order as the Court of Appeal had jurisdiction to make. No order was made in this case by any Court that the detention of the respondent by the Home Secretary, or by his procurement, was illegal in character. Neither was any order expressly asked for, or made by any Court, that the respondent was entitled to be discharged, or should be discharged from custody. If the Court of Appeal had made an order that the respondent should be discharged from custody, though that order might not have been enforceable at law, it by no

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means follows that the independent Executive of the Free State, in whose custody the respondent then was, would not have obeyed the order of the Court of Appeal. It cannot be assumed, therefore, that such an order if made would necessarily have been an abortive order. Neither can, I think, the order of May 9, 1923, be treated as an abortive order. It operates with coercive force upon the Home Secretary to compel him to produce in Court the body of the respondent. If the Executive of the Free State adhere to the arrangement made with him he can with its aid discharge the obligation thus placed upon him. If the Irish Executive should fail to help him he would be placed in a very serious position. Unless this Executive breaks what has been styled its bargain with the Home Secretary he had, in effect, the respondent under his power and control. It would be rather unfair to this Executive to assume gratuitously beforehand that it would not keep the bargain made with it, simply because that bargain was not enforceable at law.

The Court of Appeal further ordered that the Home Secretary should be allowed until May 16 to make a return to this writ. What is the function of a return to a writ of habeas corpus ? It is to set out the facts and the grounds of the detention to enable the Court mentioned in the writ to determine two questions, first whether the person to whom the writ is addressed, either directly by himself or by his agents, detained in custody the person named in the writ ? and second, if so, was that detention legal or illegal ? That is very old law : see *Darnel's Case.* (1) But it is well established, so well established that r. 222 of the Crown Office Rules provides, that the return to the writ shall contain a copy of all the causes of the prisoner's detention indorsed on the writ itself or in a separate schedule. It appears to me that it would be difficult to frame any order more inconsistent than the order appealed from with the idea that the case was at an end, that the Home Secretary had been held to be responsible for the detention of the respondent, that the latter's detention had been decided to be illegal, or that he had been ordered to be

(1) (1627) 3 St. Tr. 1, 6.

discharged or was entitled to be discharged. The opportunity of making a return is given to the Home Secretary. He is entitled to avail himself of it. That was, under the order, his legal right. Non constat but that he may have some grounds to put forward to establish the legality of his action. For instance, if, as was decided in *Rex* v. *Winton* (1), he could return that Art O'Brien the respondent was not in his possession or power or anything to that effect, that would have been a sufficient return to exculpate him if established.

It must, moreover, be assumed that the Court of Appeal thought it necessary to have a return made to enable them to dispose of the case, and that it was only just to the Home Secretary to give him the opportunity of making it. It is therefore clear, as I shall presently show, that the facts which formed the basis of the judgment of this House in the case of *Cox* v. *Hakes* (2) do not exist in this case. Those facts were that the person alleged to have been imprisoned had been by the Queen's Bench Division ordered to be discharged, and had, in fact, been discharged, with the result that, even if the House had held that he had been improperly discharged, he could not have been retaken into custody under any order the Court of Appeal or this House might make; that any such order would therefore be abortive.

The majority of the House came to the conclusion that for this reason the order made by the Court of Appeal was not an appealable order within the meaning of s. 19 of the Supreme Court of Judicature Act, 1873. Lords Watson and Macnaghten approved of the judgment of Lord Herschell. In his judgment (3) Lord Herschell said: "It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge the applicant." Lord Bramwell, with whom Lord Watson also concurred (4), said: "I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of

(1) (1792) 5 T. R. 89.
(2) 15 App. Cas. 506.
(3) 15 App. Cas. 535.
(4) Ibid. 524, 525.

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discharge on a writ of habeas corpus, and the possible futility of such a reversal, is a strong argument to shew that an appeal does not lie. I cannot, with great submission, agree that the Court may reverse, though no good may come of it. If no good may come of it eventually, I think the argument is strong to shew that the power is not given." Later, he said, "These considerations shew that the substantial question is, whether the order for the discharge of the body which is to be brought up, or treated as though brought up, was right. When there is an order of discharge I have a difficulty in seeing how a Court of Appeal can undo that order. The body is gone. The Court of Appeal cannot reverse what has been done. It cannot give the judgment that ought if right to have been given, viz., that he be remanded. He is not there." The Court of Appeal had reversed the order of the Queen's Bench Division. They held that the words of s. 19 of the Supreme Court of Judicature Act, 1873, giving the Court of Appeal jurisdiction and power to hear and determine appeals from any judgment or order, save as excepted, of Her Majesty's High Court of Justice, or any judges or judge thereof, enabled them, despite the order of discharge, and the subsequent discharge, in fact, of the person imprisoned, to hear the appeal. The House reversed the judgment of the Court of Appeal and restored that of the Queen's Bench.

It was not contended that the words of the 19th section were not wide enough to cover the order made by the Court of Appeal, but it was held that, as the absence of the prisoner who had been discharged from custody would make an order upholding the Court of Appeal abortive, a narrower construction must be given to the words of the statute in order to avoid this result. Despite the repeated efforts of all the noble Lords who took part in this case of *Cox* v. *Hakes* (1), to show that their decision and the reasoning which led to it had no application whatever to any case where the person imprisoned or detained had not been in fact discharged, yet in the case of *Reg.* v. *Barnardo* (2) we find Lord Esher saying: "The House of Lords have

(1) 15 App. Cas. 506. (2) [1891] 1 Q. B. 194, 204, 213, 214.

determined" (i.e., in *Cox* v. *Hakes* (1)), "with respect to one set of cases in which the liberty of the person brought before the Court is in question, that no appeal lies against the order for the issue of a writ of habeas corpus." With all respect the House of Lords decided nothing of the kind. He then proceeds, "It is said that their decision went further, and determined that in no case of a writ of habeas corpus would an appeal lie. Having carefully read the judgments of the House of Lords, I have come to the conclusion that they did not go so far as that. They said that the words of s. 19 of the Supreme Court of Judicature Act, 1873, were large enough to give an appeal; but when they came to consider an appeal with respect to a case in which the writ was used for the purpose of determining whether a person should be deprived of his liberty, they came to the conclusion that there were great constitutional reasons against an appeal." With all respect this last passage is not quite in accord with the decision referred to. If the noble Lord had qualified the word "person" with the words "who had already been discharged from custody" the passage would have been more accurate. Lopes L.J. takes, I think, a much more accurate view of the decision of the House in *Cox* v. *Hakes*. (1) He says: "I feel that it is somewhat anomalous to hold that one order made under a writ of habeas corpus is an order within the meaning of the word 'order' used in s. 19 of the Supreme Court of Judicature Act, 1873, and that another order is not." He then quotes the words of the section, as well as some passages from Lord Bramwell's judgment, and then says quite accurately: "The ground, however, of the judgments in *Cox* v. *Hakes* (1) is that, there being no power to recapture or re-arrest, an appeal after an order to discharge from custody would be useless; consequently, that the right way of dealing with the word 'order' in s. 19 is to limit its meaning to cases where the Court of Appeal, or the Court appealed from, can execute the order or judgment of the Court if required." He then, lower down, proceeds: "It is clear, therefore, that what the House of Lords decided

(1) 15 App. Cas. 506.

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was that, in the case of a discharge from custody under a writ of habeas corpus, there is no appeal, because the Court cannot give effect to its order. This reasoning is inapplicable to the case now under consideration. There has been no discharge of the infant. The infant is within the control of the Court, and the Court can make what order it thinks fit with regard to his custody, and can give full effect to its order or judgment."

In *Barnardo* v. *Ford* (1) the Queen's Bench Division made an order absolute for the issue of a writ of habeas corpus directed to Dr. Barnardo to bring up into Court the body of a child which had been entrusted to his care. The mother of the child claimed the custody of it. Affidavits were made on both sides which were used on the application for the issue of the writ. In Dr. Barnardo's affidavit he said that he had handed over the child to another person to be taken to Canada whose address he did not know and therefore could not produce the child. This statement was considered equivocal and was quite consistent with the person to whom the child was delivered being in fact Dr. Barnardo's agent. The Court of Appeal affirmed the order of the Queen's Bench Division. He, Dr. Barnardo, appealed to this House. A preliminary objection was raised that no appeal lay to the Court of Appeal from the Queen's Bench Division. It was held that an appeal did lie to the Court of Appeal, that the order absolute for the issue of a writ of habeas corpus was an order within the meaning of s. 19 of the Supreme Court of Judicature Act, 1873, and that the writ ought to issue, and that in order that the facts should be fully ascertained Dr. Barnardo should make a return.

It cannot be questioned that in the present case an appeal did lie to the Court of Appeal from the order of the Queen's Bench Division, nor can it be questioned, I think, that the third section of the Appellate Jurisdiction Act, 1876, confers upon this House jurisdiction to entertain an appeal from such an order as that actually appealed from. That section provides that an appeal shall lie to the House of Lords from,

(1) 24 Q. B. D. 283; [1892] A. C. 326.

amongst others, any judgment or order of "Her Majesty's Court of Appeal in England," and s. 4 empowers this House on the hearing of an appeal to determine what of right should be done in the subject-matter of the appeal, or, in other words, empowers this House to make such an order as the Court appealed from should have made. Your Lordships were pressed however not to entertain the appeal on the ground of want of jurisdiction, though the order appealed from was on its fact apparently valid; not to decide whether on the law and the facts it was valid or invalid, but to go behind it, to study the judgments delivered by the Lord Justices, to accept their opinions as sound without examining them, to hold that the order they should have made consistently with those opinions was an order that the detention of Art O'Brien was illegal, that he should be discharged from custody (albeit that the Home Secretary should then have no opportunity of making a return), and by assuming that the order which you considered should have been made had, in fact, been made, hold that you had no jurisdiction to entertain the appeal at all, or to determine whether the order under appeal was less consistent with those opinions than would have been an order discharging the respondent from custody.

My Lords, I am quite unable to come to the conclusion that such a course as this or any course resembling it should be followed. I think it would be contrary to the practice, and be unsustained by authority. No authorities in support of it have been cited in argument, and though I have searched with diligence for one myself, I have failed to find it. Judicial dicta applicable enough to the old practice which existed before the Supreme Court of Judicature Act, 1873, and the Appellate Jurisdiction Act, 1876, were passed are misleading, I think, when applied to the new system of procedure brought into existence under those enactments. Under the old practice, when the detention of an applicant for the issue of a writ of habeas corpus was held by a Court or judge to be illegal, it necessarily followed that the applicant should be discharged and set free; for the very sufficient reason that, however erroneous the decision might plainly be, there was

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no appeal from it to any tribunal. It was final and conclusive. But to hold that the same result is to follow under the new system, even in cases such as the present, where the applicant remained in custody, and under control, would in effect amount to holding that in each of the above-mentioned statutes the word "order" is to be construed as an appealable order when it pronounces the applicant's detention to be legal, enabling him to appeal to the Court of Appeal and, if need be, to this House against it, but that an order pronouncing his detention to be illegal is not an appealable order within the meaning of the same statutes. I cannot think that a construction of these statutes which would lead to such a lopsided and, in my view, unjust result is their true construction. I think it involves a modification of their provisions, not an interpretation of them. I cannot find in these statutes any indication of an intention that the applicant for a writ of habeas corpus is in all cases to have a right of appeal against all orders of a Court or judge made to his detriment, and the Crown or a prosecutor no right of appeal against any order made in his favour pronouncing his detention to be illegal.

In my view for these reasons the House had jurisdiction to hear the appeal in this case and should have heard it.

LORD SHAW OF DUNFERMLINE. My Lords, the question to be decided in this appeal is of a preliminary nature, and it is accordingly advisable that the narrative of the facts here given should be restricted to a statement sufficient to bring clearly to view the particular point on which the House feels itself bound to decline the jurisdiction which is sought to be imposed upon it by the appellant.

The respondent is a British subject, who was born and has for many years past resided in England and carried on business there. In his case presented to this House it is added that he "has also acted as the representative in London of the Irish Republican Government." The reason for this aggressive intimation is not clear.

On March 11, 1923, the appellant, His Majesty's Secretary

of State for Home Affairs, caused the respondent's home in London to be forcibly entered and the respondent to be arrested, to be conveyed to Chelsea police station, thence by train to Liverpool, and thence by a British warship to Dublin in the territory of the Irish Free State. On arrival there the respondent was taken to Mountjoy Prison, where he was, until after these proceedings were initiated, incarcerated. He was detained there by the authorities of that prison, within, of course, the ambit of the Irish Free State and within the administrative and executive jurisdiction of the Government of that State.

These proceedings did not take place in the ordinary course of the criminal law of this country. Every officer or servant of the Crown who carried them through was doing so upon what ex facie was a mere lettre de cachet. The proceedings themselves constitute abduction, imprisonment, and enforced exile—a violation, if unwarranted, of the elementary rights and liberty of the subject.

The warrant and justification for these otherwise unconstitutional acts of violence is alleged to be found in s. 1 of the Restoration of Order in Ireland Act, 1920. It was there enacted that where it appeared to His Majesty in Council that owing to the existence of the state of disorder in Ireland the ordinary law was inadequate for the prevention and punishment of crime or the maintenance of order, His Majesty in Council might issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing restoration and maintenance of order in Ireland and as to the powers and duties for that purpose of the Lord-Lieutenant and the Chief Secretary and of His Majesty's forces and other persons acting on His Majesty's behalf and in particular for the special purposes thereinafter mentioned.

On August 13 of that year a large number of regulations were issued by Order in Council. Regulation 14 B so issued is in the following terms :—

" Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State

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that for securing the restoration or maintenance of order in Ireland it is expedient that a person who is suspected of acting or having acted or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the Police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order. . . . .

"If any person in respect of whom any order is made under this regulation fails to comply with any of the provisions of the order he shall be guilty of an offence against these regulations, and any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may modify such restrictions, and if any person so interned escapes or attempts to escape from the place of internment or commits any breach of the rules in force therein he shall be guilty of an offence against these regulations. . . . .

"In the application of this regulation to Scotland and Ireland references to the Secretary for Scotland, and references to the Lord Lieutenant or Chief Secretary respectively, shall be substituted for references to the Secretary of State, but an order under this regulation may require the person to whom the order relates to reside or to be interned in any place in the British Islands."

It is under this regulation that the Home Secretary purported to act. He issued an order for the internment of the respondent, and the proceedings of apprehension, deportation, and imprisonment already mentioned took place.

Between the date of the Restoration of Order in Ireland Act, 1920, and the order of internment made by the Home Secretary an important historical circumstance had occurred—namely, the setting up of the Irish Free State.

This transaction was preceded on December 6, 1921, by

what are named "Articles of Agreement for a Treaty between Great Britain and Ireland." The transaction was carried forward by an Act made about three months afterwards —namely, on March 31, 1922—entitled the Irish Free State Agreement Act, 1922. This gave the force of law to the preceding Treaty. Finally the transaction was consummated on December 5 of the same year by an Act entitled the Irish Free State Constitution Act, 1922 (Session 2).

Under that Act, the Constitution of the Irish Free State became determined; and the status thereof became that of a self-governing Dominion, analogous with, in particular, that of Canada. By this Constitution and as a part of the grant of self-government, not only a separate Legislature, but a separate Executive for the Free State, was created.

By a statute of 1862—namely, 25 & 26 Vict. c. 20, which followed the decision in *Ex parte Anderson* (1)—it was enacted that "no writ of habeas corpus shall issue out of England, by authority of any Judge or Court of Justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion." When this is mentioned it will be seen that a grave element of difficulty had arisen for determination, in addition to other and serious issues as to the liberty of the subject which arose for settlement. It is important that I should not give any colour of determination by the way of putting the questions. I therefore merely cite from one or two of the reasons appended to the respondent's case. Among these reasons occur the following:—

"(*a*) Because it is a violation of the common law, of the Great Charter, and of the Habeas Corpus Act, 1679, to cause any person to be exiled and sent prisoner overseas without proper trial and conviction.

(*b*) Because the Restoration of Order in Ireland Act, 1920, did not authorize the enactment of any regulations which should apply or operate in England.

(1) (1861) 3 E. & E. 487.

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(*c*) Because the Order in Council made and dated August 13, 1920, and made in pursuance of the Restoration of Order in Ireland Act, 1920, did not, upon the true construction thereof, make any regulations which applied or could operate in England.

(*d*) Because any regulations made or purported to be made in pursuance of the Restoration of Order in Ireland Act, 1920, if and so far as they applied or operated in England, were ultra vires, invalid, and of no effect."

A number of other reasons attack the validity of reg. 14 B, and challenge the possibility of its being applied outside of Ireland. Of these, one—namely "*h*"—may be cited:—

"(*h*) Because reg. 14 B did not authorize the appellant to delegate to any person not under his immediate supervision and control the performance of his duties and obligations or the exercise of his powers under the said regulation."

Sufficient has been said to show what may, without exaggeration, be called the far-reaching and enormous importance of the issues raised in this case, which affected on the one hand the liberty of the subject, and on the other the autocratic power claimed by the Executive in restraint thereof.

It is now proper to state the procedure in the case and the method in which the appellate jurisdiction of this House has been invoked.

On April 10, 1923, the respondent applied ex parte to a Divisional Court (Lord Hewart C.J., Avory and Roche JJ.) for a rule nisi for a writ of habeas corpus directed to the present appellant. That Court refused the rule.

On April 13, 1923, the Court of Appeal ordered a rule nisi to issue, and on May 9 made the rule absolute. It is from this order that the present appeal is brought.

The jurisdiction of this House to entertain or deal with this appeal is challenged. The question raised by that challenge is important, not alone from the point of procedure, but on account of its constitutional significance. It was upon that question that their Lordships heard arguments.

Having come to a decision thereupon, and the decision being to the effect that the challenge of their Lordships' jurisdiction is a sound challenge, any entry upon the merits of the appeal becomes unnecessary.

I am humbly of opinion that the appeal against the order of the Court of Appeal was incompetent, and that this House has no jurisdiction to entertain it.

It is convenient to have the exact language of that order dated May 9, 1923, fully before the House. It was as follows: [His Lordship read the order.] It will be observed that this order does not include a warrant for the discharge of the respondent. He could not under its terms be said to be set at liberty.

The Attorney-General on behalf of the appellant founded upon the terms of the order. From these he maintained that two consequences follow, first, that the order does not contain in its terms a discharge of the applicant, and, secondly, that being therefore a mere order stopping short of such a discharge, which would have set at liberty the respondent, it is an appealable order.

He applied to this order s. 3 of the Appellate Jurisdiction Act, 1876. The relevant portion of that section is as follows: "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say, (1.) Of her Majesty's Court of Appeal in England."

This, said Mr. Attorney, is an order of the Court of Appeal to which the language of s. 3 in the statute of 1876 accordingly applies, it being language of complete generality. It may be that under such language the constitutional privileges, including the right of liberty of the subject, are infringed or curtailed, but there is nothing in this statute which makes an exception in regard to these topics.

The question is deeply important; it has never been considered with reference to the jurisdiction of this House. But in the case of *Cox* v. *Hakes* (1) a closely analogous question did come here. It was argued at great length in July, 1889,

(1) 15 App. Cas. 506.

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and reargued at great length in May, 1890. And the old and fundamental constitutional rule and practice of the law of England were there reaffirmed—namely, that where a person has once been discharged from custody by an order of the High Court under a habeas corpus, the Court of Appeal has no jurisdiction to entertain an appeal, and that this rule was not infringed upon or repealed by the generality of language as to appeals used in the Supreme Court of Judicature Act, 1873.

Undoubtedly the generality of s. 19 of the Supreme Court of Judicature Act, 1873, was as great as that of the section from the Appellate Jurisdiction Act, 1876, here founded upon. It was in these terms: "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

An order for the discharge of a person in custody did not come within any of the exceptions referred to in the section, and therefore, so far as the language and its full generality went, such a discharge order was covered by the language permitting appeal.

Elaborate judgments were pronounced in the case, and it was finally settled as the law of England that, where a person has been discharged from custody by an order of the High Court under a habeas corpus, the Court of Appeal has no jurisdiction to entertain an appeal.

On behalf of the appellant it was admitted with entire propriety that the principle of the case of *Cox* (1) would have applied to the present appeal had the body of the appellant been brought up in answer to the return and had the appellant been discharged and set at liberty.

But, it was argued, there was no such discharge in the order. The case had not gone to the length of setting the subject free. Had it done so, there would have been no jurisdiction to review such an order under the established law of England: but this was not done. This House, it is therefore contended, has jurisdiction to entertain the appeal, and by the general

(1) 15 App. Cas. 506.

words of the Appellate Jurisdiction Act, 1876, it is bound to do so.

The great importance happily attached by judges to the maintenance of the constitutional security for the liberty of the subject is well illustrated by the judgments of the noble and learned Lords in the case of *Cox* (1) which I am about to cite. In support of the argument for the appeal it is undoubtedly true that they did attach importance to the fact that the appeal to the High Court which was there challenged was an appeal against a discharge under a writ of habeas corpus. They were of course confronted with that as a fact. Lord Halsbury says, for instance (2): "It can hardly be disputed that no machinery is provided for giving effect to an appeal against a discharge under a writ of habeas corpus," and Lord Herschell, referring to the Courts whose functions were transferred to the High Court, says that "None of these had any jurisdiction or authority to review a discharge by a competent Court under a writ of habeas corpus or to enforce the arrest of one of those freed from custody."

The point indeed of the present appeal seems to have been expressly left open by Lord Herschell when he observes: "It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it."

We have accordingly here to determine a point in this important branch of the law never formally decided. It can only be decided as matter of principle. It is fortunate, however, that the principle was also, as I view the judgment, set forth with great and authoritative power in the case of *Cox*. (1)

Lord Halsbury L.C. observed (3): "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear

(1) 15 App. Cas. 506. (2) 15 App. Cas. 519, 530, 536.
(3) 15 App. Cas. 514, 515, 516.

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justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might —see *Ex parte Partington* (1)—make a fresh application to every Judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: *City of London's Case.* (2)

"In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by Judges as securing in a marked and exceptional manner the personal freedom of the subject."

After citing the Act of 56 Geo. 3, c. 100, with its preamble: "Whereas the writ of habeas corpus hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof:" "And whereas extending the remedy of such writ and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public," the Lord Chancellor added: "It will be observed that the Judge is to satisfy himself, and if he is satisfied that the matter returned is matter which if true would be a good return he is to do what justice requires, i.e. if he thinks the imprisonment lawful, to remand to custody; if otherwise, to enforce the immediate liberation. If, on the other hand, he is doubtful, he may hold to bail. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

It had, however, been strenuously maintained that the right of appeal given by the Supreme Court of Judicature

(1) (1845) 13 M. & W. 679, 684. (2) (1610) 8 Rep. 121b.

Act, 1873, was literally plain and perfectly general. This had to be admitted. But notwithstanding this, it was held that it could not have been the intention under general words occurring in an Act regarding legal procedure to abrogate the fundamental rights of the citizen in regard to one of the most vital parts of our Constitution; and the intention of Parliament, even while using such words, fell to be considered. It was for that reason that the case of *Stradling* v. *Morgan* (1) was cited. The passage is as follows: "From which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The principle of the matter was thus dealt with by the Lord Chancellor (2): "It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

Lord Bramwell took the case as from the fact, i.e., that

(1) (1558) Plowd. 199, 205. (2) 15 App. Cas. 522.

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discharge had occurred, but he himself says (1): "My reasons would, perhaps, apply to a case where the prisoner had been remanded." Lord Herschell also dealt with the principle underlying the judgment and with the practice of the Court in these sentences (2): "My Lords, the preliminary question argued upon the hearing of this appeal is one of great importance. It touches closely the liberty of the subject, and the protection afforded by discharge from custody under a writ of habeas corpus. The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the Courts have exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully in custody. . . . . It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from Court to Court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any Court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of habeas corpus was of opinion that the custody was unlawful."

My Lords, I have cited enough from these judgments to make it, in my humble opinion, abundantly clear that the principle underlying the judgment is that if one Court of law having power to entertain an application for a writ of

(1) 15 App. Cas. 526. (2) 15 App. Cas. 527.

habeas corpus comes definitely to the conclusion that the applicant is entitled to his discharge, no other Court either by way of review or of appeal can upset that judgment.

In Lord Halsbury's language the real decision is the determination of a right. "The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom." And in Lord Herschell's language: "If he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question."

My Lords, it is not for me to suggest for a moment any limitation of the principle there laid down. It is in accord with the legal and constitutional canons, which are, in my belief, worthy of veneration. The only question then is, Do these principles apply to the present case? Has there in short been a determination of the respondent's right to his liberty, and of the invalidity of the admitted infringement thereof by an order issuing from the Home Secretary? Had such a determination been made in proceedings ex parte, the result would have been the same.

Yet on this subject the careful procedure taken by the Court of Appeal in the present instance is worthy of remark. The case might have proceeded ex parte, but upon April 13, 1923, the learned judges, in view of the important question affecting the liberty of the subject which was involved in granting leave to the Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue, thought it right to intimate the proceedings to the Attorney-General. The officers of the Crown accordingly attended on the whole question, and there without any doubt the applicant's right to liberty was fully discussed. The statutes, orders, and regulations affecting the case, and the affidavits therein, were debated, and upon May 9 judgments full of care and learning were delivered, the whole of this being unquestionably done in foro contentioso. The question of right was determined and decided. Why, then, did not discharge follow?

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The reason for that was owing to the attitude taken up by the appellant, the Home Secretary. It seemed impossible to determine at that stage whether he could or could not bring up the body. Under his order, the body had been removed beyond the jurisdiction of the ordinary Courts of this country and placed within the jurisdiction of the Irish Free State, being thereafter in an Irish prison administered by the officers of that State. What was the nature of the arrangement, if any, for redelivering the body was uncertain. In these circumstances their Lordships of the Court of Appeal made a warrant returnable within one week, i.e., on Wednesday, May 16. Nothing required to be done in the case except to set the applicant free and to award costs. The merits of the case were decided; the question of right was settled. In these circumstances, my Lords, I am of opinion that it would be contrary to the principle of our law to permit that question of right thus and then determined to be reopened, and that your Lordships' House have no jurisdiction to review or to control what was then done.

The appellant founded on the case of *Barnardo* v. *Ford* (1), which, in its circumstances, is very far removed from the present case. That was an application by a parent for a writ of habeas corpus, in respect of a child, directed to the head of an institution for destitute children. It appeared that Dr. Barnardo had, with the approval of the child's mother, handed over the child to be taken to Canada, and the allegation was that he did not know the address of such person or where the child was. The Queen's Bench Division made absolute an order for the issue of the writ and that order was affirmed by the Court of Appeal, a judgment which was sustained in this House. No question was determined as to its merits. It appears from the judgment of the Lord Chancellor that the parties (at least one of them) desired a return to the writ so that upon the return further questions of evidence might be raised. The principal feeling of the House seems to have been expressed broadly by Lord Macnaghten in these words: "I cannot say that this is a case

(1) [1892] A. C. 326, 333, 340.

in which there ought not to be an opportunity of further inquiry into the circumstances under which Dr. Barnardo parted with the child, and ascertaining beyond all doubt whether the child is or is not still under Dr. Barnardo's control or within his reach."

Lord Watson put it: "Seeing that the writ must go, and that the appellant will have the opportunity of making further explanations, I refrain from comment upon the facts already in evidence." It appeared that the process was being used, not for the purpose of ascertaining the right to compel the return of the child, but for the purpose of obtaining remedy for the legal wrong committed by having parted with the custody of the boy. The distinction between that class of case and the ordinary habeas corpus case was taken by all the judges and was succinctly stated by Lindley L.J. in *Reg.* v. *Barnardo.* (1) "The question," said he, "whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child."

The case, accordingly, entirely differs from the present, where the facts are fully before the Court, and where the defence of the seizure has failed.

I think the law of England to be long settled to the following effect, i.e., that when once a legally constituted Court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other Court or by any Court of review or appeal. It may be that a discharge may be postponed on account, for instance, of some temporary impediment to the production of the body, but if the question of right is settled, there can be no appeal or review of that settlement.

My Lords, I think it right further to observe that urgency is written all over the face of habeas corpus proceedings. "Preventing delay," "immediate determination of the right to the applicant's freedom," the avoidance of "the delay and uncertainty of ordinary litigation"—these expressions are

(1) [1891] 1 Q. B. 194, 210.

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significant of urgency as an essential quality of the proceedings.

The present case shows well how fully this is recognized by the Courts of this country.

The judgment of the Court of Appeal making the rule absolute was delivered on May 9. The appellant was ordered by the Court of Appeal to bring up the body of the respondent on Wednesday, May 16; between these dates—namely, on May 11—Mr. Attorney-General appeared and asked the indulgence of the House to be heard upon Monday, May 14, and the House, following the salutary practice which favours the urgency to which I have referred, acceded to the request.

But the case then took a curious turn. On May 14 the jurisdiction of this House was challenged on the ground of the incompetency of the appeal. The learned Attorney maintained that as the judgment appealed from had not discharged the respondent and set him at liberty, therefore the appeal was competent.

And so far as this House is concerned, the very arguments on the question of jurisdiction to which your Lordships had the honour of listening were made possible by this House itself, in its concession of a hearing to the appellant two days before that appointed for the bringing up of the body, and before discharge of the applicant had been accomplished as a necessary consequence of the decision of the Court of Appeal already delivered on May 9.

I pass from the topic by declaring that I should not have been a consenting party to a transaction of the kind had I been apprised that by doing so the House was being committed to the position that an argument was being presented to the appellant in restraint of the liberty of the respondent, which would have been impossible had the procedure taken its ordinary course and the concession to urgency not been made. I am perfectly sure that this had not appeared with its legal possibilities at the time when the application was made to this House. Of course no consideration of such a kind can, however, determine the decision of the question of the fundamental principle involved.

In the view which I take of this appeal the question at stake transcends an ordinary case of jurisdiction. To sustain jurisdiction would be to claim a right to circumvent or destroy that finality of liberation which has been long affirmed as a part of English constitutional law. It would, in short, be a usurpation by this House of a right and power to destroy a liberty already properly affirmed as a matter of right in one of His Majesty's subjects. Your Lordships are thus determining not merely in the present case to decline a jurisdiction, but to decline a usurpation. That usurpation is forbidden.

And beyond finality, I repeat that the point of urgency, an essential point, would also be violated by our assertion of a power to review a liberating judgment. The procedure of our Courts in vindicating the right that "No freeman shall be taken or imprisoned or disseised . . . . or in any way destroyed, nor will we pass upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land" (1) is established. In the procedure in reference to the writ of habeas corpus this thirty-ninth chapter of Magna Charta has been interpreted in the spirit of the fortieth chapter: "To no one will we sell, to no one will we refuse or delay, right or justice." An appeal against an unwarranted destruction of liberty is not to be refused or delayed. Promptitude is guaranteed, because without promptitude the illegal loss of liberty would be continued and enlarged.

The occasions are frequent in which the temptations are severe to abridge these fundamental rights. Parliament may make such abridgment in plain language of its own and, so to speak, with its eyes open, or it may do so in a form more concealed, looser, less open to scrutiny, and much more convenient and not unfamiliar to administrators, by giving power for the issue of orders or regulations by a Committee of the Privy Council; but, of course, this has to be determined in its legality by the exact ambit of the delegated power. I do not see, in view of the affidavit by the applicant in this case, that the temptation was not great to take a swifter

(1) For detailed exposition see Dr. McKechnie's Commentary, 2nd ed., p. 375.

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course against him than the law permits. I must decline such short cuttings. There is hardly any great historical occasion on which a Government might not plead its view of the public good and the public convenience as an excuse for a violent deprivation from the subject of those rights in which he is secured by law. In declining jurisdiction in this case, your Lordships are not doing more than affirming a settled principle and declining to permit an invasion of constitutional right. In the judgment which I had the honour to deliver in *Rex* v. *Halliday* (1) I had the misfortune to dissent from the judgment then delivered. But, my Lords, there can be no dissent from what I there have ventured to call "Hallam's penetrating judgment" on this very topic. I think it not unfitting to repeat it here. After citing those chapters of Magna Charta to which I have alluded, Hallam adds: "It is obvious, that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the aera, therefore, of King John's Charter it must have been a clear principle of our constitution that no man can be detained in prison without trial. Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that aera the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty; and if ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced."

I agree to the motion proposed from the Woolsack.

Appeal dismissed as incompetent.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondent: *Gisborne, Woodhouse & Co.*

(1) [1917] A. C. 260, 295.

[HOUSE OF LORDS.]

FOOD CONTROLLER AND OTHERS . . . APPELLANTS; AND CORK . . . . . RESPONDENT. H. L. (E.)* 1923 July 25.

Company—Winding Up—Voluntary Liquidation—Insolvency—Crown Debt—Priority—Prerogative of Crown—Debt due to Food Controller—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 186, 209.

By the combined effect of ss. 186 and 209 of the Companies (Consolidation) Act, 1908, the bankruptcy rule that Crown debts have no claim to priority of payment, other than such priority as is given by statute, obtains in the case of the voluntary winding up of an insolvent company.

In re Henley & Co. (1878) 9 Ch. D. 469 and *In re Galvin* [1897] 1 I. R. 520 distinguished.

Decision of the Court of Appeal [1922] 2 Ch. 369 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of P. O. Lawrence J. (2)

The facts, which are fully stated in the report of the case before the Court of Appeal, may be shortly summarized as follows :—

During the war the appellant, the Food Controller, in exercise of certain statutory powers conferred on him in that behalf, appointed H. J. Webb & Co. (Smithfield, London), Ld., agents to sell on commission and distribute frozen rabbits imported from Australia by the appellants, the Board of Trade. The company sold the rabbits to various retail dealers and received the purchase moneys, which it was bound to pay over to the Food Controller less commission and expenses. On July 9, 1920, the company went into voluntary liquidation and was found to be insolvent. At that date the company owed the Food Controller 9689*l.* 5*s.* 10*d.*, representing purchase moneys which had been collected by the company on account of the Food Controller but not paid over to him.

The Food Controller lodged a proof for the debt and

* *Present :* EARL OF BIRKENHEAD, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

(1) [1922] 2 Ch. 369. (2) [1921] 2 Ch. 276.

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claimed to be paid in priority to the other creditors of the company on the ground that it was a Crown debt. The liquidator (the respondent) admitted the debt but denied priority, and thereupon the Food Controller issued a summons in the winding up claiming priority. The question turned on the construction of the Companies (Consolidation) Act, 1908, ss. 186 and 209.

P. O. Lawrence J. held that the debt was entitled to priority, but the Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.) reversed his decision and held that the combined effect of ss. 186 and 209 of the Companies Consolidation Act, 1908, was to extinguish the priority of the Crown in respect of debts due to it by an insolvent company in a winding up, except so far as priority was expressly conferred upon the Crown by s. 209.

By the Ministry of Food (Cessation) Order, 1921, the appellants, the Board of Trade, were made successors of the Food Controller.

1923. June 4, 5. *Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* (with them *Dighton Pollock* and *Roland Burrows*) for the appellants. The prerogative right of the Crown to be paid debts due to it in priority to debts due to a subject has never been questioned from the time of Lord Coke, and in regard to this matter there are in fact two prerogatives. There is first the right of the Crown to enforce payment of a Crown debt by a writ of extent. The second prerogative is that whenever the right of the Crown and the right of the subject with respect to the payment of a debt of equal degree come into competition the right of the Crown prevails.

[They referred to Chitty's Prerogatives of the Crown (1820 ed.), p. 265; 33 Hen. 8, c. 39, s. 50; *Rex* v. *Wells* (1); *Attorney-General* v. *Leonard*. (2)]

Neither of these prerogatives can be taken away by statute except so far as the Crown is expressly mentioned or referred to by necessary implication.

(1) (1812) 16 East, 278, 281. (2) (1888) 38 Ch. D. 622.

The Court of Appeal have held that in regard to a debt due to the Crown from an insolvent company in voluntary liquidation, the prerogative rights of the Crown have been extinguished by ss. 186, 207 and 209 of the Companies Consolidation Act, 1908. That Act is, however, a consolidation Act, and in order to ascertain the true construction of the sections above referred to it is necessary to trace the history of the legislation which led up to the passing of the Act. It is conceded that neither of these prerogatives was affected by the Companies Act, 1862. That Act provided by s. 133, as one of the consequences of a voluntary winding up of a company registered under the Act, that the property of the company should be applied in satisfaction of its liabilities pari passu and that a liquidator should be appointed for the purposes of the winding up. But neither under that Act nor under any subsequent Act have the assets of the company been vested in law in the liquidator; they remain the property of the company until they are alienated by the liquidator in exercise of his powers. By the Judicature Act, 1875, s. 10, it was provided that in the winding up of any company under the Companies Acts of 1862 and 1867, whose assets proved to be insufficient for the payment of its debts and liabilities and the costs of the winding up, the same rules should prevail and be observed as to (inter alia) the respective rights of secured and unsecured creditors and debts and liabilities provable as might be in force for the time being under the law of bankruptcy. At that date the law of bankruptcy was contained in the Bankruptcy Act, 1869. By s. 32 certain debts (including all assessed taxes, land tax and property or income tax assessed on the bankrupt up to April 5th next before the date of the order of adjudication and not exceeding in the whole one year's assessment) were made payable in priority to all other debts, and subject thereto all debts provable were to be paid pari passu. By s. 49 an order of discharge released the bankrupt from all debts provable in the bankruptcy except (inter alia) Crown debts, from which the bankrupt could only be released with the written consent of the Commissioners of the Treasury.

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By s. 12 no creditor was to have any remedy against the property or person of the bankrupt except as directed by the Act; and by s. 17, on adjudication, the property of the bankrupt vested in the trustee. In 1878, where an insolvent company was being voluntarily wound up under the Companies Act, 1862, the question of the priority of a debt for income tax assessed on the company under Schedule A in respect of certain lands owned by the company came up for decision in *In re Henley & Co.* (1) The Court of Appeal held that this debt must be paid in priority, first, because under the first prerogative the Crown was not debarred from taking proceedings against the property of the debtor, and, secondly, because, even if the matter were treated solely as one of administration, under the second prerogative the Crown's right prevailed whenever the right of the Crown and the right of a subject with respect to the payment of the debt of equal degree came into competition. The Court must have inferred, though it did not so decide in terms, that the Crown's right to priority in the voluntary winding up was not affected by s. 10 of the Judicature Act, 1875. In *Ex parte Postmaster-General* (2) it was held that the rights of the Crown under an extent were not affected by the relation back provisions of the Bankruptcy Act, 1869, and that decision shows also that a special statutory provision affecting the priority of certain kinds of Crown debts—at that time s. 32 of the Bankruptcy Act, 1869—does not involve that the other provisions of the Act, where the Crown is not named, are intended to apply to the Crown. Subsequently the Bankruptcy Act, 1869, was replaced by the Bankruptcy Act, 1883. By s. 40 provision was made (in terms very similar to s. 32 of the Act of 1869) for the priority of certain debts, and, subject thereto, all debts were to be paid pari passu, and by s. 150, save as in the Act provided, the provisions of the Act relating to (inter alia) the remedies against the property of a debtor, the priorities of debts, and the effect of a discharge were made binding upon the Crown. Shortly after the passing of this Act *In re Oriental Banking*

(1) 9 Ch. D. 469.

(2) (1879) 10 Ch. D. 595.

Corporation (1) was decided by Chitty J., who held that the provisions of this Act which took away the remedies of the Crown against the property of the debtor in the case of bankruptcy had not, by virtue of s. 10 of the Judicature Act, 1875, been incorporated in the Companies Act, 1862, so as to bar the prerogative right of the Crown to issue process, and thus to obtain payment in full in priority to other creditors, in respect of a debt due from a company in liquidation, and he left open the question whether the second prerogative of the Crown—the right to priority in the administration of the assets under the discretion of the Court—was taken away. In the result the Crown was held entitled to payment in full. Then came the Preferential Payments in Bankruptcy Act, 1888, which provided by s. 1, sub-s. 1, that in the distribution of the property of a bankrupt and of the assets of any company being wound up under the Companies Acts priority should be given to certain specified debts (including the rates and taxes comprised in s. 32 of the Bankruptcy Act, 1869). In *In re Galvin* (2), which was decided under the Irish Bankruptcy Amendment Act, 1872, which reproduced the provisions of s. 32 of the Act of 1869 as to the special debts to which priority was given, and under the Irish Preferential Payments Act of 1889, Palles C.B. held that the prerogative right of the Crown in regard to debts other than the specified debts was not affected. In the Companies Consolidation Act, 1908, s. 186 replaces s. 133 of the Companies Act, 1862, s. 207 replaces s. 10 of the Judicature Act, 1875, and s. 209 replaces s. 1, sub-s. 1, of the Preferential Payments in Bankruptcy Act, 1888. The Bankruptcy Act, 1883, has now been replaced by the Bankruptcy Act, 1914. Sect. 33 replaces s. 40 of the Act of 1883, and s. 151 replaces s. 150 of that Act. The result of the authorities is that the Crown's prerogatives remain unaffected. To succeed, the respondent must show that both the first and the second prerogative of the Crown have been destroyed. The Crown may treat the winding up as non-existent for the purpose of exercising its right to seize the assets of its

(1) (1884) 28 Ch. D. 643, 647. (2) [1897] 1 I. R. 520.

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debtor. The effect of the Crown's insisting on its writ of extent is to diminish the assets to be administered in accordance with the provisions of the Companies Acts. There being here no cessio bonorum, as there is in bankruptcy, the assets of a company in liquidation still remain its property and the writ of extent can operate up to the last moment. So long as any property remains in the debtor that property is bound by an extent issued by the Crown. In that case it stands outside the winding up, and it may be that it cannot then take advantage of the special provisions of s. 209. If on the other hand the Crown chooses to prove in the winding up, the special priority granted by s. 209 does not affect the rights of the Crown in regard to other debts, and the order of priority then is: (1.) Preferential debts; (2.) Crown debts other than those specifically mentioned; (3.) debts of subjects. If it had been intended that the Act of 1908 should have the effect given to it by the Court of Appeal a provision similar to s. 150 of the Bankruptcy Act of 1883 (now replaced by s. 151 of the Act of 1914) should have been inserted. It is by reason of that provision that the Crown has lost its priority in bankruptcy. Moreover s. 133 of the Companies Act, 1862, which was not binding on the Crown, has not become binding on the Crown merely by its inclusion in a Consolidation Act. The Crown cannot be held in his case to have elected to come in under the winding up, and it now proposes to proceed by writ of extent. In *New South Wales Taxation Commissioners* v. *Palmer* (1), which was decided upon a statute of New South Wales, Lord Macnaghten, delivering the judgment of the Privy Council, states, in accordance with the view expressed in *In re Henley & Co.* (2), that the Crown possesses two separate and distinct prerogatives (though this has been doubted by the Master of the Rolls in the present case) and he regards the law on this subject as settled by the decision of the Court of Appeal in *Henley's Case.*

[They also referred to *Richards* v. *Kidderminster Over-*

(1) [1907] A. C. 179.

(2) 9 Ch. D. 469.

seers (1); Lindley on Companies (1902 ed.), pp. 997, 998; and *In re West London Commercial Bank.* (2)]

Sir John Simon K.C. and *Montgomery K.C.* (with them *L. W. J. Costello*) for the respondent. The first question is what is the relation between the statute law and the royal prerogative. The true view is not that the prerogative is a fixed quantum, but that it is that portion of discretionary or arbitrary authority which from time to time is left in the Crown after giving effect to the statutes by which the royal prerogative has been curtailed. Where Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised, and so long as the statute remains the prerogative power to do the thing provided for by the statute is in abeyance: Maitland's Constitutional History of England, p. 418; *Attorney-General* v. *De Keyser's Royal Hotel.* (3) Therefore the point to be determined is this. Taking the statute law as it stands and reading it in the manner above suggested, what is the inference to be drawn as to the extent to which the royal prerogative is in abeyance—what is the residue of prerogative power which can live side by side with the statute? The Companies Act, 1862, did not bind the Crown, because it did not refer to it. But since the passing of that Act efforts have been made from time to time to bring the law of winding up into a condition analogous to the law of bankruptcy, and it is submitted that this statute of 1908 has succeeded in putting the liability of a company in liquidation to the Crown in the same position as the liability of an insolvent debtor. What is the Crown's contention under s. 209? Is it that unspecified Crown debts come in before the specified Crown debts or after? There is nothing in the statute which authorizes the view that specified Crown debts come first, then unspecified Crown debts, and then subjects' debts. It is impossible to work the statute

(1) [1896] 2 Ch. 212, 217.
(2) (1888) 38 Ch. D. 364.
(3) [1920] A. C. 508, 526, 539; [1919] 2 Ch. 197, 216.

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consistently with the survival of the royal prerogative. Seeing that the Crown was a party to an express statutory benefit, it follows that the Crown's prerogative in regard to this matter of priority is in abeyance, because it cannot live side by side with the statute. The difficulty is redoubled by considering the working of the writ of extent. That cannot live with the ordinary administration of a winding up, for it could be used as long as the liquidator had any money in his hands. The whole machinery is inconsistent with the Crown's coming in under the Act: Robertson on Civil Proceedings by and against the Crown, pp. 189, 271. There is no authority binding on this House for saying that there are two separate prerogatives, one of which can be taken and the other left. The general proposition is that where a claim of the Crown and a claim of a subject enter into competition the Crown has priority. The writ of extent is merely a particular mode of enforcing that priority. There are no separate prerogatives. As to the history of the matter, the real dividing line was 1888, because then for the first time there was passed a statute which in terms relates both to bankruptcy and to the winding up of companies and, as regards priority of debts, provides, in effect, that the rules of bankruptcy shall prevail. Sect. 209 of the Act of 1908 reproduces those provisions. As to *In re Galvin* (1) Palles C.B. was dealing with an Irish Bankruptcy Act, which did not contain a pari passu clause, as the English Act did, and he relies upon that distinction. Sect. 186 of the Act of 1908, which also provides for a pari passu payment, distinguishes that case. Sect. 186 and s. 209 are literally inconsistent, and upon any view of the Act it is agreed that s. 209 must be read as a kind of appendage to s. 186. It follows that the Crown recognizes that, but for the modified priority conferred by s. 209, all creditors are to be paid pari passu. If the principle of the prerogative cannot apply the machinery for collecting Crown debts cannot apply either.

Sir Thomas Inskip S.-G. replied.

The House took time for consideration.

(1) [1897] 1 I. R. 520.

1923. July 25. EARL OF BIRKENHEAD. My Lords, this is an appeal against an order of the Court of Appeal reversing the decision of P. O. Lawrence J.

The question, shortly stated, is whether the admitted bankruptcy rule that Crown debts have no claim to priority of payment, other than is given by statute, obtains equally under the statutes now in force in the case of winding up an insolvent company. The trial judge decided that the Crown's prerogative right of priority still exists in the case of the winding up of a company, though extinguished in the case of bankruptcy. The Court of Appeal decided that the effect of the statutes now in force is that the rule is the same in both cases and that the Crown's prerogative right of priority in the winding up of an insolvent company has been extinguished.

I am of opinion that the decision of the Court of Appeal was right and that the appeal therefore fails.

The matter is really concluded by the view which I understand that your Lordships have formed of the joint effect of ss. 186 and 209 of the Companies Consolidation Act, 1908, for I think that the earlier Acts are only helpful to the history of the matter. The sections referred to are as follows :—

Sect. 186 : "The following consequences shall ensue on the voluntary winding-up of a company :—

(i.) The property of the Company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the Company."

Sect. 209 : "(1.) In a winding-up there shall be paid in priority to all other debts—

(*a*) All parochial or other local rates due from the Company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the Company up to the fifth day of April next before

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that date, and not exceeding in the whole one year's assessment ;

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the Company during four months before the said date, not exceeding fifty pounds ; and

(*c*) All wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the Company during two months before the said date : (to which a proviso is added)

(*d*) Unless the Company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date, subject nevertheless to the provisions of section five of that Act."

" (2.) The foregoing debts shall—

(*a*) Rank equally amongst themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions ; and

(*b*) In the case of a company registered in England or Ireland, so far as the assets of the Company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the Company, and be paid accordingly out of any property comprised in or subject to that charge."

It has been pointed out, and, indeed, is obvious, that these two sections are, if considered separately, irreconcilable ; for it is impossible at one and the same time to apply the property of the company in satisfaction of its liabilities pari passu, and to allow the preferences permitted by s. 209. Obviously, therefore, the sections must be construed together and the most harmonious construction evolved which the language

and the evident intention of both permit. The effect of s. 209 is to allow priority to specified Crown debts, to specified wages, and to workmen's compensation. It necessarily follows that the generality of the language of s. 186 must be supplemented and corrected by the particularity of the exceptions enumerated in s. 209.

And still another conclusion would seem to be not less inevitable. At the time when the Act of 1908 became law it was fairly arguable that under the general law of prerogative, and in virtue of various statutory provisions, Crown debts were entitled to a general priority on the winding up of the company. No such claim can survive the particular enumeration contained in s. 209. For the Legislature has indicated the general principle in s. 186—namely, that the property is to be distributable pari passu—but in s. 209 it enumerates certain exceptions which are to be admitted from the general rule already laid down. Among these exceptions are certain particular Crown debts. It would have been plainly impossible to adopt this form of legislation if it had been intended that other Crown debts should retain a priority inconsistent alike with the general language of s. 186 and with the motive which led to the specification of admitted exceptions contained in s. 209.

My decision therefore is based simply on inferences which seem to me to be necessary as to the effect of the clauses under consideration. The construction which I adopt makes it superfluous to embark upon any general consideration of the prerogative, or of the difference between Crown debts as the term was used generations ago and that term in a changed age, when it governs sums of money owing to the immense trading establishments which various Government Departments have been authorized to create.

I mention, lest I appear to have ignored it, the Irish case of *In re Galvin.* (1) Palles C.B. pointed out in his judgment that there is a vital difference between the Irish and the English bankruptcy legislation in a very material respect, for the English Act provides that "save as provided by this

(1) [1897] 1 I. R. 520.

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section, all debts provable under the bankruptcy shall be paid pari passu." And he added the observation that if any such provision had been part of the Irish bankruptcy law he would have taken the view that the Crown had lost all priority for any debts other than that provided by s. 49 of the Irish Bankruptcy Act of 1872. I was somewhat surprised that the Attorney-General founded himself upon a decision which, rightly considered, reinforces the conclusion I have reached in the present case.

I move that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, the question for decision in this case is whether the Crown has any prerogative right to require payment of Crown debts due from a company which is insolvent and in voluntary liquidation, in priority to all other creditors of the company, or in priority to all such creditors of the company as are not given priority by the Companies Acts.

The facts and circumstances out of which this question has emerged may be shortly stated: H. J. Webb & Co., Ld. (Smithfield, London), now insolvent and in liquidation (for convenience styled "the Company"), was employed by the Food Controller, acting under the powers conferred upon him by the New Ministries and Secretaries Act, 1916, and by certain regulations made under the Defence of the Realm Act, 1914, to sell on commission and distribute large quantities of frozen rabbits which, to meet the threatened shortage of food, the Board of Trade had purchased from certain State Governments in Australia, paid for, and imported into this country.

The course of business followed was this: This Company, acting on behalf of the Food Controller, sold and delivered these rabbits to purchasers throughout England, collected from those purchasers the purchase money, which it was bound to pay over, less commission, to the Food Controller. On July 9, 1920, when the Company went into liquidation, it owed to the Food Controller the large sum of 9689*l.* 5*s.* 10*d.* in respect of money received for the rabbits sold but not

accounted for. This is the debt for which the Crown claim priority.

I concur with the Master of the Rolls in thinking that the expression "Crown debts" and "debts due to the Crown" are unfortunate expressions, inasmuch as they suggest, at least to the uninitiated, that the Sovereign claims the right to be paid debts due to him, to the exclusion of the rights of his subjects, either for his own use or for the public use as determined by him. Ages ago these words would probably be considered to apply to taxes or suchlike, but now, and especially during the war, when the different Departments of Government became more like great trading and industrial corporations than anything else, it is obvious that it leads to misunderstanding when the trade debts due to these Corporations are sought, by the exercise of the royal prerogative, to be recovered in priority to those due to subject creditors. And it is not to be wondered at, if it be true, that a tendency may be detected in the legislation passed from the year 1883 downwards dealing with bankruptcy, and the voluntary winding up of companies, to place, to some extent at all events, the Crown substantially in the same position as private creditors. In the case of *New South Wales Taxation Commissioners* v. *Palmer* (1) which was a case arising on the Colonial Bankruptcy Act of 1898, a statute following closely the English Bankruptcy Act of 1883, but not containing any section corresponding to s. 150 of the latter statute, by which section it was provided that save as therein provided, the provisions of the Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge should bind the Crown, Lord Macnaghten, adopting the law as laid down by Macdonald C.B. in *Rex* v. *Wells* (2), and following the decision of the Court of Appeal in the case of *In re Henley & Co.* (3), laid it down that the decision in the latter case rested on two separate grounds and upon two distinct prerogatives. He said: "It

(1) [1907] A. C. 179, 184. (2) 16 East, 278.
(3) 9 Ch. D. 469.

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was a case of winding up, not of bankruptcy. The property had not passed out of the company. The Court therefore held that the Crown was still at liberty to pursue its extreme rights against the company's property" (i.e., evidently by writ of extent) "and was on that ground entitled to priority. But the Court also held that under the other and wider prerogative the claim of the Crown must prevail."

At p. 182 Lord Macnaghten, after citing the following passage from the judgment of Macdonald C.B. in *Rex* v. *Wells*, "I take it to be an incontrovertible rule of law that when the King's and the subject's title concur the King's shall be preferred," proceeded to say: "Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community."

Well, if that be so, as no doubt it may be, I think it is to be regretted that some name or description has not been substituted for the description "Crown debts" or "debts due to the Crown" which would more clearly indicate than do these latter terms the benefit to the community intended to be conferred by the exercise of the royal prerogative in these cases. The words, "except so far as the Legislature has thought fit to interfere," used by Lord Macnaghten are wide words. If one should find that schemes have been set up by statutes for the administration of the estates of bankrupts, and for the administration and application of the assets of insolvent limited liability companies which are being wound up, of such a nature that the concurrent exercise by the Crown of one or both of its prerogatives produces unreasonable and absurd results, must not one come to the conclusion that the Legislature must have intended to interfere with those prerogatives, and to trench upon them sufficiently to avoid these results?

Before dealing with some of those results, I may say that I share the view which the Master of the Rolls states he is inclined to entertain—namely, that the Crown really is not

entitled to two prerogatives, but only to one prerogative enforced, no doubt, in two different ways and by two different methods, the right enforced by each method being the same right—namely, the right to require a debtor to the Crown to pay this debt before he pays the debts he may owe to others. The Crown may assert its right by seizing under a writ of extent, if need be, all the assets of the debtor, where there has been no cessio bonorum, and satisfy out of these assets the debt due, or the Crown may come into a proceeding in bankruptcy or to the winding up of an insolvent company or suchlike, prove its debt claimed and insist upon payment of this debt in priority to the claims of other creditors. This is styled the wider prerogative, but in each case the same single and undoubted right, and that alone, is enforced.

To take a familiar instance by way of illustration. A lessor is entitled to receive from his lessee the rent reserved by the lease when it becomes due. If the lessee should not pay his rent, the lessor may distrain (seizing under a writ of extent has been styled by Cotton L.J. a distraint), or he may sue the lessee on the latter's covenant to pay the rent. What the lessor is in each case enforcing is the single simple right to be paid his rent, though he may enforce it by either of these two methods. I confess I cannot but think the Crown is somewhat in the same position.

I turn now to consider some of the cases in which the royal prerogative comes into conflict, in proceedings in bankruptcy and also in winding-up proceedings, with the statutory provisions dealing with these matters.

The first section of the Preferential Payment in Bankruptcy Act of 1888 (51 & 52 Vict. c. 62) deals with the distribution of the property of a bankrupt, and also with that of the assets of a company being wound up under the Act of 1862. By sub-s. 6 of s. 1, this Act is made to apply to the case of a deceased person who died insolvent, as if he were a bankrupt, and as if the date of his death were the date of the receiving order; and by s. 3 the Act is made to apply also to the case of receiving orders, and orders for the administration of the

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estate of deceased debtors according to the law of bankruptcy made, and winding-up proceedings commenced, after the commencement of the Act. All these instances are treated in similar terms, yet the Crown prerogative may treat entirely differently the persons or bodies named according as there has or has not been a cessio bonorum in the case. The first section enacts that in the distribution of assets of a bankrupt or in the distribution of the assets of a company being wound up under the Act of 1862 certain debts shall be paid in priority to all other debts. These debts are: (*a*) Parochial or other local rates due from the bankrupt or the company at the date of the receiving order, or as the case may be at the commencement of the winding up, and having become due and payable within twelve months before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company within the dates mentioned, these latter are obviously debts due to the Crown. (*b*) Next come the salaries and wages due to clerks or servants. (*c*) Next wages due to labourers and workmen. Then sub-s. 2 provides that these debts shall rank equally between themselves and shall be paid in full out of the assets, and in the event of the assets being insufficient they are to abate rateably. That involves a direct interference with at least the larger prerogative. The statute puts the Crown debts mentioned in its first section precisely on a level with parochial and local rates, and wages due to clerks, servants or workmen. There may be debts due to the Crown other than those to which statutory priority is thus given. But it would seem to me that the second prerogative would, strictly speaking, enable the Crown to take no step whatever during all the time that the liquidator is ascertaining the liabilities of the company, adjudicating on contested claims, collecting the assets, and then at the last moment, but before these assets had been actually distributed by the liquidator, come in under a writ of extent, seize all the assets of the company in order to satisfy all the debts due to the Crown, and leave nothing whatever to satisfy the parochial and other rates, or the wages and salaries which had got statutory priority under the

first section. That, I think, would be a strange, a grotesque result.

I asked several times during the course of the argument if the Crown were not bound to elect which of the remedies it would pursue, but, as I understood, no admission was made that it was bound to do so. It is scarcely possible, it would appear to me, to hold that the Legislature when passing the Act of 1888 did not intend to interfere with and trench upon the royal prerogative sufficiently to prevent such results as these. The Legislature by statute gave to the Crown the right to secure priority for debts due to it of a certain class to be obtained in a certain prescribed way. I do not think it can secure priority for those very debts otherwise than in the way and by the means the statute has provided that this shall be done.

I now turn to the Companies Act of 1908 (8 Edw. 7, c. 69), s. 186. It is a reproduction of s. 133 of the Companies Act of 1862. It provides expressly that the property of a company shall be applied in satisfaction of its liabilities. Sect. 209 deals with preferential payments. It is a little more than a re-enactment of s. 1 of the before-mentioned Act of 1888. It deals with Crown debts of a specified class, and secures that Crown debts of that class, together with debts of three other classes—namely, wages or salaries for clerks or servants, wages of workmen and labourers, and, under certain conditions, compensation to workmen under the Act of 1906—shall all have equal priority. These debts rank equally amongst themselves and abate rateably if there be a deficiency of assets. This is the only statutory priority given. This Act, like every other Act, must be construed as a whole.

Sects. 186 and 209 must, as far as possible, be reconciled the one to the other and construed together. Sect. 186 would thus become binding on the Crown, inasmuch as s. 209 qualifies it and restricts the area of reach of s. 186. The latter section must therefore be read as if the words "save as hereafter provided" were written into it. And this, I think, is clear, that all the property of the company not needed to implement s. 209 is irrevocably dedicated by this s. 186 to the satisfaction

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of the liabilities of the companies (which, of course, must include debts) pari passu. Thus interpreted, this statute clearly deprives the Crown of all right to priority for any debts due to it other than that given by s. 209.

Much reliance was placed by the Crown on the judgment of Palles C.B. in *In re Galvin.* (1) That was a case arising on the Irish Bankruptcy Act of 1872 (35 & 36 Vict. c. 58). Its forty-ninth section provides, as does s. 32 of the English Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), for the payment of certain classes of debts, Crown and others, in priority to all other debts; but the English section contained a vital provision which is omitted from the Irish Act—namely, this: "save as aforesaid, all debts provable under the bankruptcy shall be paid pari passu." The Chief Baron distinctly states that had the Irish statute contained this provision or any provision to the same effect, he would have held the Crown was deprived of the right of payment in priority in respect of any debts other than those expressly named in the forty-ninth section of the Irish Act. If the provision that all debts other than those named should be paid pari passu were sufficient to deprive the Crown debts of their claimed priority, how much more potent in the Chief Baron's opinion must have been the words of s. 186 of the Act of 1908?

In my opinion the appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE (read by EARL OF BIRKENHEAD). My Lords, I entirely agree with the judgment of Lord Atkinson.

The matter appears to me to be settled by the provisions of the Companies Consolidation Act, 1908, if only one does what one ought to do—namely, read ss. 186 and 209, so as to make them work together. The first-named section says that the property of the Company is to be applied in satisfaction of its liabilities pari passu. Sect. 209 deals with priorities among debts. These priorities include parochial and local rates, due for the past twelve months, and assessed

(1) [1897] 1 I. R. 520.

taxes, land tax, property tax or income tax up to April 5 before the winding up; the wages of clerks, servants, workmen or labourers; and amounts due for compensation under the Workmen's Compensation Act. All these debts are slumped together and must be paid in full unless the estates are insufficient to meet them, and in that case they shall be paid in equal proportions. The result of this is that certain particular Crown debts have a priority not over, but along with, certain wages and workmen's compensation. This priority of specified debts having been satisfied, the rights of all creditors, including the Crown in respect of debts other than those specified debts, are to rank pari passu.

The Crown, as a creditor, is by its assent to this legislation plainly restricted in priority to the limited specification of Crown debts given. It follows that, beyond that point, the Crown assents to an equal division. Any super-eminent right, whether under the name of prerogative or otherwise, has disappeared. The Crown stands plainly bound to that result.

It might be sufficient to leave the matter there: but in case the treatment of this appeal should ever be attempted as a precedent for recognition on a wide scale of what are Crown debts, I desire to make the following observations. I think, with the Master of the Rolls, that the expression "Crown debts" and "debts due to the Crown" are unfortunate expressions. They do suggest that, under the name of prerogative, something is being claimed higher than that justice which is distributed among subjects of the Crown, and this even under ordinary contracts, the construction of which among such subjects would not permit of the operation of preference.

As I am merely reserving the point, it is, of course, no part of my duty to go over the wide field of prerogative. But I may illustrate my reservation by the case of the *Commissioners of Taxes for New South Wales* v. *Palmer*. (1) The judgment of the Privy Council was delivered by Lord Macnaghten and naturally great authority must attach to

(1) [1907] A. C. 179, 182.

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it. His Lordship said: "In *Rex* v. *Wells* (1), in a passage which has been often cited, Macdonald C.B. says: 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred.' Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord Coke in *Quick's Case.* (2) From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently."

My Lords, I venture to interpose much doubt as to the application or extension of the expression used by Macdonald C.B., "that where the King's and the subject's title concur the King's shall be preferred," and the modernization of it given by Lord Macnaghten, to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on. If a special statute confers upon such departments priorities, preferences, excuses for misfeasance or exemptions from liability, then of course the statute controls the situation. But if the propositions above cited should ever be used to justify or widen the royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realize that this dictum of Lord Macnaghten's occurred in a case in which the nature of the debts, as Crown debts, and that in a very strict sense, was clear beyond all question. The claim of the Crown in the *Palmer Case* was in respect of "the sum of 53*l.* for land and income tax and fine, being a debt due to the Crown by virtue of the Land and Income Tax Assessment Act, 1895, and Acts amending same." There, accordingly, the Crown

(1) 16 East, 278, 282. (2) (1611) 9 Rep. 129*b*.

debt was clear as such and as being within a definite sphere of action plainly within the law applicable to the royal prerogative.

Almost at the other end of the scale, however, stands the present case on its facts. What is alleged to be recoverable by preference under the royal prerogative arises in the following way. (I quote from the respondent's case):

"Under the provisions of the New Ministries and Secretaries Act, 1916, and certain Regulations made under the Defence of the Realm Consolidation Act, 1914, H. J. Webb and Company (Smithfield, London), Limited, hereinafter called 'the Company,' agreed with the Food Controller to sell and distribute frozen rabbits which were being imported by the Board of Trade under some arrangement with certain State Governments in Australia. The Company was to retain a percentage upon the amount of the sales effected by it and was to pay over the balance to the Food Controller.

"9. The Company sold and delivered to various retail customers frozen rabbits received from the Food Controller and were paid the purchase moneys therefor. The Company, however, did not pay the Food Controller the whole of the sums due to him under his agreement with the Company."

My opinion is now delivered with the most complete reservation of the point whether facts of such a nature could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the royal prerogative.

How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. It is not in the ordinary enumeration of debts incurred for the service of the country. It is an instance simply of a debt arising under ordinary transactions of principal and agent. A Government Department, in the course of realizing Government property, appointed an agent to conduct a transaction. That agent defaulted to the extent of nearly 10,000*l.* and then became bankrupt. The debt arises purely in commercio.

It is unnecessary in this case to commit oneself to the proposition that when Departments of Government enter

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into the commercial or industrial sphere they do so with such an enormous leverage against all competitors or subjects of the Crown.

As at present advised, I can imagine nothing more damaging to the royal prerogative. As time proceeds, the Government does no doubt increasingly enter into the commercial or industrial sphere; but if the argument suggested be sound, it would further appear as a consequence that as spheres of Government action widen, the prerogative of the Crown grows larger and larger and the escape from obligations or the use of preference over the rights of the ordinary citizens would in a greater and greater measure extend. These questions are enormously important; they will have, unless Parliament itself interposes to clarify the situation, to be decided some day.

The respondent did not argue these broad questions, but conceded that he was willing to take the case on the ground that the debt was within the privileged category. This would not have necessarily precluded—it never could preclude—the Court taking the point. But the learned counsel might have been of opinion that the statute of 1908 was so clear in its language that he need not embark on any further or constitutional voyage. In my view, this opinion was sound; and, as stated, my opinion is that the appeal is put out of Court by the sections of the Act which I have already cited.

LORD WRENBURY. My Lords, I listened with interest to the historical review which the Attorney-General gave your Lordships of the development of the statute law relevant to the matter before the House. But I derive little, if any, assistance from the knowledge that, for instance, a particular section is in terms identical with a section which as the law previously stood was found in a framework different from that in which it is now found. To ascertain the present law it is necessary to consider such a section in the framework in which it now stands. In other words, I have to consider the statute law as it is. In so doing I may confine myself for the present purpose to ss. 186 and 209 of the Companies

Consolidation Act, 1908, with such assistance, if any, as is afforded by other sections of that Act.

The first observation to be made on ss. 186 and 209 is that they are obviously in conflict. Sect. 186 enacts that all liabilities shall be satisfied pari passu. Sect. 209 enacts that they shall not, but that some debts shall have priority over others. It is necessary, therefore, to read s. 186 as prefaced by some such words as "Subject to the other provisions of this Act."

The second observation is that s. 209 as affecting the rights of the Crown in respect of Crown debts is binding on the Crown. By assenting to an Act which affected the rights of the Crown it is obvious that the Crown waived its prerogative to the extent necessary to give effect to the Act so long as the Act was in operation.

The third observation is that as s. 209 binds the Crown, s. 186, which deals with the same subject matter—namely, the application of the assets in satisfying the liabilities—also binds the Crown.

With this preface I go on to consider, first, what is the prerogative or (if there be more than one) what are the prerogatives of the Crown, and, secondly, what is the operation of the statute in respect of them.

The Crown by virtue of its prerogative is entitled to say: "In payment of debts I have the right to come first—and to enforce that right I can proceed by way of writ of extent." I should not myself describe this as two prerogative rights, of which one is larger than the other, but rather as one prerogative right and a prerogative remedy to enforce the right. I can understand that the Crown might surrender the latter while retaining the former, but not that it could surrender the former while retaining the latter. If the right to come first is surrendered, the prerogative remedy to enforce that right by writ of extent must have been surrendered also. The question for decision, therefore, I think is, and is only, whether the Crown has surrendered the prerogative right to come first.

The effect of s. 209 is as follows: By s. 209, sub-s. 1 (*a*),

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certain Crown debts, which I will call the specified Crown debts, are brought into the class of debts identified by s. 209, sub-s. 1 (*a*), (*b*), (*c*), (*d*). Debts of this class are to be paid "in priority to all other debts," in priority, therefore, to (amongst others) the unspecified Crown debts. Subject to the priority right of this class, all liabilities are by s. 186 to be satisfied pari passu. The specified Crown debts, therefore, are to be paid pari passu with the other debts in the class created by s. 209, sub-s. 1, and in priority to all other debts, whether Crown debts or not, which are not in that class. Further, all debts, whether Crown debts or not, which are not in that class are to be paid pari passu after satisfying the above priority. This is the statutory administration of the assets, and to this the Crown has given its assent.

It follows from what I have said that the Crown is no longer in a position to say "I come first." It does not come first. Some debts have been raised by s. 209, sub-s. 1, to a position in which they rank with the specified Crown debts, and that class comes first.

Other debts have been raised by s. 186 to a position in which they rank with the unspecified Crown debts, and these are to be postponed and to be paid pari passu.

By assenting to an Act which altered the rights of the Crown in manner above stated, the Crown surrendered its prerogative right to come first, and necessarily surrendered also its prerogative right to enforce by writ of extent a right of priority which existed no longer.

In the course of the argument a phrase was used which, unless rightly understood, tends only to confusion. It was said that the Crown might remain "outside the winding up" and might exercise its remedy by writ of extent, because the statutory scheme of administration of the assets in the winding up could not affect the Crown if it remained "outside the winding up." The phrase "outside the winding up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is

immaterial to me whether my mortgagor is in winding up or not. I remain 'outside the winding up' and shall enforce my rights as mortgagee." This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say "I will prove in respect of my debt." If so, he comes into the winding up. But an unsecured creditor cannot remain "outside the winding up." He must, if he is bound by the Act, obtain in the winding up such relief as the statute gives him. There is no cessio bonorum, it is true, but the authority of the liquidator is an authority which extends to all the assets of the company.

In saying this there must be added one qualification already indicated.

If the statute by express words or by necessary implication provides that, notwithstanding the winding up, the rights of a defined person shall remain unaffected, then no doubt he is "outside the winding up" for all purposes. If, therefore, the Crown stands in that position, then no doubt all its rights, both that of priority and that of enforcement by writ of extent, remain unaffected. But that is not this case. The Crown is obviously by the provisions of s. 209 within the Act. It cannot be both within it and without it.

It remains only to say a word as to *In re Henley & Co.* (1) In 1878, when that case was decided, the statute law stood as follows: Sect. 133 of the Companies Act, 1862, enacted that all liabilities should be satisfied pari passu, but the Act nowhere referred to Crown debts, and did not bind the Crown. Sect. 32 of the Bankruptcy Act, 1869, did refer to Crown debts and did bind the Crown; but s. 32 operated only in bankruptcy, and did not apply in winding up. Sect. 10 of the Judicature Act, 1875, enacted that in winding up the rules in bankruptcy in this matter should prevail and be observed. The bankruptcy rules, therefore, after 1875 prevailed in winding up as regards all who were bound by the Act of 1875. But the Act of 1875 did not bind the Crown. It followed that so much of the Bankruptcy Act, 1869, as did bind the Crown was

(1) 9 Ch. D. 469.

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not by the Act of 1875 made applicable to the Crown in winding up as distinguished from bankruptcy. It is singular that although the question upon the Act of 1875 is referred to in the argument as reported before Malins V.-C. (1), it is nowhere dealt with in the judgments in the Court of Appeal. The Lords Justices decided the case upon the footing only that the Companies Act, 1862, did not bind the Crown. If they had added, as I do, that the Judicature Act, 1875, did not bind the Crown either, they would have made the matter complete. The decision in *In re Henley & Co.* (2) is no authority upon the present case, because the statute law is not now that which it was when that case was decided. Sect. 209 of the Act of 1908 does bind the Crown, and it binds the Crown to a statutory scheme of administration of the assets wherein the prerogative right of the Crown to priority no longer exists.

My Lords, for these reasons I think that this appeal fails.

My noble and learned friend, Lord Carson, who is unable to be here, desires me to say that he entirely concurs in the judgment I have just read.

Solicitor for the appellants: *The Solicitor to the Board of Trade.*

Solicitors for the respondents: *F. C. Mathews & Co.*

(1) 9 Ch. D. 471. (2) 9 Ch. D. 469.

[PRIVY COUNCIL.]

DEMERARA BAUXITE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

LOUISA HUBBARD AND OTHERS . . . RESPONDENTS.

J. C.*
1923.
May 15.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL. (COLONY OF BRITISH GUIANA.)

Solicitor and Client—Confidential Relationship—Purchase of Option from Client—Failure to disclose Information.

A transaction, such as the purchase of property under an option, where the vendor and purchaser are client and solicitor (or where a similar confidential relationship exists) and the vendor has not had independent advice, cannot be upheld unless it is proved affirmatively that the purchaser disclosed, without reservation, all the information in his possession, and that the transaction was a fair one in all the circumstances. To fulfil those conditions it must be shown that the solicitor advised his client as diligently, and that the transaction was as advantageous, as if the client had been dealing with a stranger. This principle is of wide application, and should not be regarded as a technical rule of English law. Although the relationship of solicitor and client, in a strict sense, has terminated, the same principle applies so long as the confidence naturally arising from that relationship is proved, or may be presumed, to continue.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 68 of 1922) from a judgment of the West Indian Court of Appeal (December 1, 1922) affirming a judgment of Berkeley J., sitting in the Supreme Court of British Guiana.

The action was brought by the appellant company against the respondents, Mrs. Louisa Hubbard, H. C. Humphrys, and L. T. Emory. On January 31, 1919, the respondent Mrs. Hubbard for a consideration of $25 had granted to the respondent Humphrys an option to purchase certain land in the colony of British Guiana for $5500. By letters in February, 1919, the appellant company agreed to buy and the respondent Humphrys agreed to sell the land for $11,200; and Humphrys thereupon purported to exercise his option

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, and LORD PARMOOR.

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to purchase from Mrs. Hubbard. In or about May, 1919, Mrs. Hubbard, being advised that the sale to Humphrys was unenforceable, agreed to sell the property to the respondent Emory for $12,000. The appellant company claimed in the action to set aside the sale to Emory, and to enforce the sale to Humphrys and by him to themselves.

The main questions in the action were whether the relations of Humphrys and Mrs. Hubbard, and his conduct with regard to the transaction between them, rendered that transaction unenforceable on the principles applicable to the dealings of a solicitor with his client. Mrs. Hubbard's husband, to whom the land had belonged, died in 1915, and Humphrys had acted as her solicitor in obtaining probate of his will (of which one Burrowes was the sole executor) and in subsequent litigation; there were concurrent findings that the relationship of solicitor and client continued to exist at the date of the option. The extent to which Humphrys disclosed to Mrs. Hubbard the facts within his knowledge in reference to the option appears from the judgment of the Judicial Committee.

1923. April 13, 16. *Sir John Simon K.C., de Freitas K.C.* and *Wylie* for the appellant. The transaction between Humphrys and Mrs. Hubbard was a valid one. English law applies to the matter: Ordinance 15 of 1916 (British Guiana). The appellant does not dispute the general proposition in Dart's Vendors and Purchasers, 7th ed., p. 45; this case however falls within the exceptions there mentioned. The price named in the option was a fair one; the larger price obtained was the result of a purely speculative value. All the material facts known to Humphrys were disclosed by him. He was not acting as Mrs. Hubbard's solicitor in the matter, and it does not appear that she relied on his advice; she relied on that of Burrowes, the executor. [Reference was made to *McPherson* v. *Watt* (1); *Edwards* v. *Meyrick* (2); *Wright* v. *Carter* (3); and *Allison* v. *Clayhills*. (4)]

(1) (1877) 3 App. Cas. 254, 261, 262.
(2) (1842) 2 Hare, 60.
(3) [1903] 1 Ch. 27, 61.
(4) (1907) 97 L. T. 709.

Upjohn K.C. and *J. K. Young* for the respondents were not called upon.

May 15. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal against a judgment and order of the West Indian Court of Appeal, whereby that Court dismissed the appeal of the appellants from a judgment of Berkeley J., sitting in the Supreme Court of British Guiana, which ordered that the action by the appellants should be dismissed with costs to the respondents Hubbard and Emory, and with no costs to the respondent Humphrys. It is not necessary to discuss the form of the action, nor was any difficulty raised on this point in the hearing before their Lordships. The questions at issue are (1.) whether at the material date the relationship between Humphrys and Mrs. Hubbard was of such a nature that it constituted the confidential relationship of solicitor and client, and (2.) whether, if such relationship existed, the conduct of Humphrys, and the nature of the bargain between him and Mrs. Hubbard, were such that the transaction is unenforceable, on the principles applicable to transactions between a solicitor and client.

The first issue may be dealt with shortly. There is a concurrent finding in both Courts that the relationship of solicitor and client did exist between Humphrys and Mrs. Hubbard on January 30, 1919, which is accepted by both parties as the material date. It is not suggested that, in either Court, a wrong principle was applied. In both Courts reference is made to the judgment of Parker J. in *Allison* v. *Clayhills*. (1) In that case Parker J. said that although the relationship of solicitor and client in a strict sense has been discontinued, the same principle applies so long as the confidence, naturally arising from such a relationship, is proved or may be presumed to continue, and that even if the solicitor is no longer retained or acting, his duty, in the contemplation in a Court of equity, may still be such as to throw upon him the onus of upholding the validity

(1) 97 L. T. 709.

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of a purchase or lease from his clients, and that in considering whether this onus lies upon him the test appears to be the proper answer to the question, whether in the particular transaction he owes his former client any duty in the contemplation of a Court of equity. Whether in any particular transaction any duty exists which makes the relationship between the parties that of solicitor and client, will depend upon all the circumstances of the particular case. In the present appeal the relevant circumstances are such that their Lordships cannot doubt that at the date of the transaction in question, January 30, 1919, both Courts were right in holding that Humphrys did stand in a confidential relationship with Mrs. Hubbard. It is fair to Humphrys to say that he does not in his evidence question the confidential nature of the relationship which existed between him and Mrs. Hubbard, but states quite frankly that the duties incident to this relationship were not, at the relevant date, present to his mind.

Humphrys first saw Mrs. Hubbard in October, 1915. She called on him accompanied by Burrowes, who introduced her to him. Burrowes was present on the occasion of most of the subsequent meetings. Humphrys advised Mrs. Hubbard, and also Burrowes, in the winding up of Hubbard's estate, and with reference thereto did the necessary legal business. Mrs. Hubbard gave all her legal work to Humphrys, and his relationship to her as legal adviser was not terminated until May or June, 1920. It is, moreover, material to observe that Humphrys, who at that time was a proxy director of the appellant company, was approached, in reference to the sale of the properties in question, by the chairman, J. A. King, who said to him, "Humphrys, Mrs. Hubbard is a client of yours isn't she?" Humphrys replied: "Yes, I attend the Court and represent her in a certain action against the estate." J. A. King further said: "Will you let us know if Mrs. Hubbard is going to sell?" Humphrys replied: "All right, I will do my best for you, but you had better write me and make me an offer." On January 23, 1918, Mr. A. G. King, secretary to the company, wrote a letter to Humphrys

offering " your client " the sum of $3000 for the properties in question. Humphrys told Burrowes of this offer, and subsequently Burrowes told him that Mrs. Hubbard would not accept it. At a subsequent interview Humphrys mentioned the matter to Mrs. Hubbard, but she refused to entertain it. In March or April, 1918, Humphrys received another offer of $5000 from the appellant company, and informed Burrowes. Burrowes saw Mrs. Hubbard, but she declined the offer. In January, 1919, the respondent, Emory, met Humphrys, stating that the properties were not worth more than $5000, or $5500, as they had very little bauxite on them, and that the value to the appellant company was that they lay between their lands. He asked Humphrys to ask Mrs. Hubbard to give him an option of buying them for $5500. Humphrys said he could not do this having regard to his relationship with the appellant company, but said that he would ask Mrs. Hubbard to give him an option for $5500, and, that if he got it, he would tell the appellant company, and ask if they intended to spring on their offer. He further told Emory that he would put the highest offer before the appellant company, and let them say if they would take it or not. Humphrys asked Burrowes to ask Mrs. Hubbard to come and see him, as he wished to make her an offer for the land of $5500. It is material to note that what Humphrys mentioned was not an option to purchase, but an offer for the land, and that the interview was sought not by Mrs. Hubbard but by Humphrys. On January 30, 1919, Mrs. Hubbard came to Humphrys' chambers accompanied by Burrowes, and her niece Mrs. Valladares. It was argued on behalf of the appellant company that there was no evidence, or not sufficient evidence, that the relationship of solicitor and client existed between Humphrys and Mrs. Hubbard when they met to discuss the offer made by Humphrys on that date. It appears to their Lordships that the narrative, as above set out, is amply sufficient to support the findings of both Courts. Independently of those findings, their Lordships would have no hesitation in coming to the conclusion that when Humphrys met Mrs. Hubbard on January 30, 1919,

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he was in a confidential relationship to her, and that his duty towards her was the same as that which exists between a solicitor and his client.

The interview at the chambers of Humphrys on January 30, 1919, is so material that it is better to give at length the evidence of Humphrys. In examination in chief, Humphrys states: "On January 30, Mr. Burrowes, Mrs. Hubbard and Mrs. Valladares came to my chambers. On coming in Mrs. Valladares said, 'Mr. Humphrys, auntie and I have been speaking over this matter, and we have decided to sell the lands as they are not earning anything.' They all sat down, Mrs. Hubbard asked me the last offer made by Mr. King for the land. I said $5000, therefore my offer of $5500 for the option is $500 in excess. I reminded her that the Bauxite Company had said $5000 was their final offer. I told her some people in America might want to acquire these properties and might or might not care to take them for more than $5500, and therefore I might or might not make a profit on the transaction because the Bauxite Company, although they had said $5000 was their last offer, might change their minds when they knew someone else was after it. I said if she gave an option it must be for three months, and I was only prepared to pay $25 for option. She then said, 'Mr. Humphrys, if I sell these lands to you, what about these actions? Transport would be opposed.' I said, 'No, I would guarantee no trouble in that respect because if I exercised the option I would arrange with J. T. Hubbard's solicitor to deposit security and pass transport. If he refused, no transport would be passed until actions concluded.' Burrowes said, 'In that case Mrs. Hubbard would be out of her money for a long time and it would not be earning any interest.' I said that was so and that if I exercised option, I would pay her interest on purchase price, $5500 at 6 per cent. Burrowes said this was fair, and Mrs. Valladares then said to Mrs. Hubbard, 'I think, auntie, you had better sell the lands.' Mrs. Hubbard said, 'Yes, I think so,' and turning to Burrowes asked him what he thought. He said, 'The lands are yours and if you are satisfied I am satisfied.'

Mrs. Hubbard asked what papers I would require her to sign. I said I would send a written option next day to her. I told her I am only 'prepared to pay $25 for an option.' I don't remember telling her what operated to make the offer only $25. I knew in my own mind. I told her any profit I made over and above $5500 would be mine. There was no question of my selling for her. She knew profit was mine."

This account is supplemented in the cross-examination: "Q.—In making your offer to Mrs. Hubbard did you tell her that Mr. King, both in writing and verbally, had requested you to inform him if Mrs. Hubbard decided to sell? A.—Mr. King never, up to that date, had written to me on that point, but he had spoken to me. I did not tell Mrs. Hubbard I had done so. It never occurred to me to tell her because I was not conscious of the law relating to solicitor and client, nor did I bring my mind to bear on the fact that I was dealing with a client. I looked on her as an ordinary individual without any regard to the law on solicitor and client. On account of her age I told her I might or might not make a profit. I also told her that as I had known her for a long time [*sic*]. I did not tell her Emory had asked me to get an option for him from her for $5500. I never mentioned his name at all. I told her the last offer of Bauxite Company was $5000, and I offered $500 more. I told Mrs. Hubbard that when Bauxite Company knew someone else was in the field they might spring on their offer. I did not tell Mrs. Hubbard that someone else was in the field in so many words. I told her someone in America might want to acquire the property."

The first question which arises is whether Humphrys made a full disclosure to Mrs. Hubbard of all the facts known to him to enable her to decide whether it was in her interest to give Humphrys a three months' option for $25. In the opinion of their Lordships the answer must be in the negative. Humphrys knew at this time that Emory had made a definite offer beyond that of the Bauxite Company, a matter directly material both on the advisability of granting an option to Humphrys, and as to the amount at which such an offer

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should be given. He further stated that the Bauxite Company's offer for $5000 was a final offer, and did not inform Mrs. Hubbard of what he told Emory, that the Bauxite Company would give more than $5000, and that if he obtained the option from Mrs. Hubbard of $5500 he would tell the Bauxite Company, and ask if they intended to spring on their offer. The position was, to the knowledge of Humphrys, that there were two competitors desirous to obtain an option over the properties, and that the prospect of the price to be obtained, depended on the extent to which they were prepared to outbid one another. Mrs. Hubbard and Burrowes, at the interview on January 30, 1919, appear to have regarded the granting of the option as equivalent to a sale of the lands, whereas in truth Humphreys bought, for the sum of $25, the probability of enhanced value to be obtained from the competition between the Bauxite Company and Emory. No one in a confidential relationship towards Mrs. Hubbard, such as that of solicitor towards his client, could have fulfilled his duty in taking an option over the properties of the person towards whom he stood in such a position, without specifically informing her of the offers which had been made and explaining their effect on the question of value. This necessarily constituted the main element for consideration in determining whether or not it was in the interest of Mrs. Hubbard to grant the option in favour of Humphrys. Humphrys himself says that he did not tell Mrs. Hubbard that he had spoken to Mr. King, because he was not conscious of the law relating to solicitor and client, nor did he bring his mind to bear on the fact that he was dealing with a client.

The omission of Humphrys to disclose to Mrs. Hubbard the fact that Emory had asked for an option over the property for $5500 is not remedied by his telling her that some people in America might want to acquire the properties, and might, or might not, care to take them for more than $5000, and that therefore he might, or might not, make a profit on the transaction, because the appellant company, although they had said $5000 was their last offer, might change their minds when they knew some one else was after it. An exact

disclosure of the conditions under which Emory made his offer was, in the opinion of their Lordships, essential to enable Mrs. Hubbard to determine whether the offer made by Humphrys to her was a fair one. There does not appear to have been, in the ordinary sense, a market for the properties in question, and the value therefore to a large extent depended upon the existence of probable competitive purchasers. The crucial date is January 30, 1919. It is not a question of honesty, but of a full disclosure and of a fair price. If, at this date, it could be shown that Humphrys had fulfilled all the duties which attached to his confidential relationship towards Mrs. Hubbard, the fact that he subsequently made a considerable profit on the transaction would not render it void and unenforceable. Humphrys says that he was astonished when a few days later Emory offered $11,000, and in return the appellant company $11,200.

On the other hand, it is no answer that he had underrated the fair sum to be inserted in the option, since Mrs. Hubbard was entitled to know fully all the factors, which in such a case would be of importance to her in coming to a conclusion what the sum should be. The conclusion is that Mrs. Hubbard did accept less than a fair sum in the option from a person who stood to her in a confidential position, and whose offer she might not have accepted, had all the relevant facts been placed before her.

If these findings are accepted, the appellant company cannot succeed in their action to enforce on Mrs. Hubbard the terms of the option made between her and Humphrys, unless it can be shown that she had competent independent advice. The principle has long been established that, in the absence of competent independent advice, a transaction of the character involved in this appeal, between persons in the relationship of solicitor and client, or in a confidential relationship of a similar character, cannot be upheld, unless the person claiming to enforce the contract can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession, and can further show that the

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transaction was, in itself, a fair one, having regard to all the circumstances. In order that these conditions may be fulfilled it is incumbent to prove that the person who holds the confidential relationship advised his client as diligently as he should have done had the transaction been one between his client and a stranger, and that the transaction was as advantageous to the client, as it would have been, if he had been endeavouring to sell the property to a stranger. This principle is one of wide application, and must not be regarded as a technical rule of English law. An apt illustration of its application to Scotch law is to be found in the case of *Gillespie & Sons* v. *Gardner* (1), to which their Lordships were referred during the argument, and which states that a bargain between a law agent and his client cannot be supported unless the law agent can show that the bargain was fair, and entered into without concealment of any kind.

The only remaining question is whether it can be shown that Mrs. Hubbard had competent independent advice from Burrowes. Burrowes was not in a position to give independent advice as co-executor with Mrs. Hubbard. He wrote a letter on February 1, 1916, to one Catherine Van Sertima, making a suggestion that the undivided halves of the properties in question should be transported to her, or that she be paid in cash the half value of the said properties, $750. The whole value of the properties was $1500, as stated in the declaration for estate duty. There is a further letter from Burrowes to Catherine Van Sertima, dated March 27, 1916, in which it is stated that Catherine Van Sertima had accepted from Mrs. Hubbard the sum of $900 for her half of the share of Mrs. Hubbard. Burrowes further states in his evidence that he thought $5000 a fair offer for the properties, and told Mrs. Hubbard so, but that she was disinclined to accept $5000, and so he informed Humphrys. Burrowes further states that if it was his property he should at once have sold, and invested in Government bonds at 5 per cent. The fact that Burrowes, as co-executor, had had before him previous offers for the

(1) 1909, S. C. 1953, 1061.

properties, and that he regarded $5000 as a fair offer is not sufficient to constitute him into a competent independent adviser. At the interview at the chambers of Humphrys, on January 30, 1919, it appears that Burrowes was under the impression that the transaction contemplated was a sale, and not merely an option which might never be carried out. It is true that Burrowes, as well as Humphrys himself, said that the higher figure offered after January 31 was a complete surprise to him and to every one, and if Humphrys could have shown that he had fulfilled all the conditions which attached to his confidential relationship, their Lordships do not think that the transaction could have been set aside on the ground that he had received a price so far in excess of that contained in the option. It was further argued that Mrs. Hubbard, subsequently, and with full knowledge, affirmed the sale she had made with Humphrys at an interview on April 7, 1919. The only evidence in support of this allegation is that it having come to the notice of Humphrys that nasty remarks had been made as to his buying the properties under the terms of the option at $5500, he had an interview on that date with Mrs. Hubbard and Burrowes at which he asked her to say if she was dissatisfied, and that he would give her the whole of the purchase price, but that it would put him in a very uncomfortable position, as he had arranged to give another gentleman $2700 out of it. Mrs. Hubbard asked if any reduction was to be made from the $5500, as she would like it clear. Humphrys undertook to see that she got it without any reduction. If the original transaction is unenforceable for the reasons given, it is clear that it was not subsequently ratified at this date, even if such ratification is possible.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs and will humbly advise His Majesty accordingly.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Druces & Attlee.*

[PRIVY COUNCIL.]

J. C.* 1923 *June* 23.

HALLEN . . . . . APPELLANT;

AND

SPAETH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Landlord and Tenant—Lessor's Covenant to purchase Buildings erected by Lessee—Sub-lease in Breach of Lessee's Covenant—Buildings erected by Sub-lessee—Action by Lessee—Absence of Arbitration fixing Value—Fiji Real Property Ordinance (40 of 1876).

The appellant let an estate in Fiji to the respondent for a term of ten years, and covenanted that at the end of the term he would purchase "by valuation buildings erected by the said lessee," with a reference to arbitration if the parties were unable to agree the valuation. The respondent covenanted not to transfer the demised premises without the written consent of the appellant; but, in breach of that covenant, he sub-leased for the entire term, there being similar covenants in the sub-lease. At the end of the term, the appellant having resumed possession, the respondent sued him to recover the value of buildings erected by the sub-lessee. There had been no agreement as to the amount of the valuation, and no arbitration.

Held, (1.) that the action failed, since upon the true construction of the appellant's covenant the respondent could not recover in the absence of an agreement, or an award, as to the amount of the valuation: *Dawson* v. *Fitzgerald* (1876) 1 Ex. D. 257 distinguished; but, (2.) that the buildings were within the covenant and an arbitration should be directed, since the respondent was bound by contract to the sub-lessees in respect of them, and the fact that the sub-lease was in breach of the respondent's covenant was not material, there being no proviso for re-entry.

Further, that it was not necessary to consider whether the rule that an underlease of an entire term is to be treated as an assignment (the reasons for which were given in *Beardman* v. *Wilson* (1868) L. R. 4 C. P. 57) was excluded by the provision of a statutory form for transfer by the Fiji Real Property Ordinance, 1876, since the contract between the respondent and the sub-lessees, and not the estate which passed, was the determining factor.

Judgment of the Supreme Court reversed.

APPEAL (No. 33 of 1923) from a judgment of the Supreme Court of Fiji (October 22, 1922).

The action was brought by the respondent against the

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARMOOR, and LORD TREVETHIN.

appellant in the Supreme Court in circumstances which appear from the judgment of the Judicial Committee.

The acting Chief Justice gave judgment for the respondent for 4544*l.* 10*s.*

1923. June 4. *Tomlin K.C.* and *H. H. Ostler* for the appellant. The sub-lease granted by the respondent was an assignment leaving him no interest enabling him to support the action: *Lewis* v. *Baker.* (1) Having regard to the respondent's covenant the lease cannot be construed otherwise. The Fiji Real Property Ordinance, 1876, ss. 47, 48, prevent the respondent from suing as lessee after a transfer by him. But in any case, the respondent cannot sue in the absence of either an agreement or an award fixing the amount of the valuation: *Milnes* v. *Gery.* (2)

Wilfred Green K.C. and *Stamp* for the respondent. The lease by the respondent cannot be treated as an assignment. He could not transfer his interest; further, the effect of the instrument was not necessarily to divest the whole term: *In re Moore and Hulm's Contract.* (3) Upon the true construction of the appellant's covenant the respondent could sue, although the valuation had not taken place. The covenant imposed a liability; the ascertainment of the amount was a collateral matter, not a condition precedent: *Dawson* v. *Fitzgerald.* (4) There was no provision remitting to arbitration the question whether or not there was a liability. Further, there was a repudiation by the appellant which rendered arbitration unnecessary: *Jureidini* v. *National British, &c., Insurance Co.* (5)

Tomlin K.C. replied.

June 26. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal by the defendant in an action from a judgment of the Supreme Court of Fiji, deciding that the respondent, the plaintiff, was entitled to

(1) [1905] 1 Ch. 46, 50.
(2) (1807) 14 Ves. 400.
(3) [1912] 2 Ch. 105.
(4) (1873) L. R. 9 Ex. 7; 1 Ex. D. 257.
(5) [1915] A. C. 499.

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recover from the appellant the sum of 4544*l.* 10*s.* and costs. The sum mentioned represents the value, as determined by the Acting Chief Justice, who tried the case, of buildings, growing crops, stock and implements, on an estate in the colony. The case of the respondent is that he became entitled to this amount under the provisions of a covenant contained in a lease of the estate dated February 25, 1911.

By this lease, which was registered under the Transfer of Land Ordinance of 1876 of the colony, the appellant demised the estate to the respondent at a yearly rent of 800*l.* for a period of ten years from July 1, 1912. The lease provided that the lessee should have the option of a further lease of the premises, after the expiration of this term, for a new period of ten years, upon terms and conditions to "be agreed between the parties." In the event of failure to so agree then the lessor bound himself to purchase "by valuation the buildings erected by the said lessee and also the growing crops, stock and implements," and also to take over the unexpired terms of the indentured immigrants working on the lands demised. If the parties could not agree on the valuation all matters in difference in relation thereto were to be referred to the arbitration of two indifferent persons, one to be appointed by each party, and every such arbitration was to be subject to the provisions relating to arbitration of the Common Law Procedure Act, 1854. The lessee bound himself not to transfer the premises demised without the consent in writing of the lessor.

The lessor gave no consent in writing to a transfer. It appears, however, that the respondent had stated his intention to sublet the estate to two gentlemen named Ragg and Holmes. This intention he carried out by a lease to them dated July 4, 1911, for the whole of his own term of ten years from July 1, 1912, with covenants in precisely the same terms as those in the lease to himself. The only difference was that a larger rent was payable to him, at first 1400*l.* and later on 1600*l.* per annum.

Ragg and Holmes appear to have been in occupation of the estate at the time of the lease to the respondent, and

he seems to have left it to them to erect proper buildings and carry out the cultivation, and supply all necessary implements and materials. This they did. Holmes died in 1918, and his executors in conjunction with Ragg subsequently gave a security over the crops to the Colonial Sugar Refining Company and also a bill of sale over the implements and live stock, to secure advances made to them by the company.

In March, 1922, the respondent entered into negotiations with the appellant for a renewal of the lease in accordance with the provisions of its terms. They, however, could not agree on terms, and the title under the lease of the respondent to have a valuation was asserted by him. The appellant instructed an agent, one Costello, to take possession, and Costello intimated to the respondent that he had done so. The respondent then purported to make a valuation as provided by the lease, but he did not formally appoint an arbitrator, or call on the appellant to appoint his own arbitrator. The learned judge who tried the action has treated as insufficient the proceeding of the respondent in this reference, and their Lordships take the same view.

The situation of the parties when the original term of the respondent's lease expired was therefore as follows. The respondent was prima facie entitled, agreement not having been come to about terms for renewal, to a valuation of the buildings he had erected and of crops, stock, and implements. As the valuation could not be agreed, he was entitled to go to arbitration. It is true that he had sub-demised for the entirety of his term, contrary to the stipulation in his lease. But the lease conferred on the lessor no right to put an end to the term for such a breach, and his remedy was merely in damages for breach of agreement. Their Lordships take the view that such a sub-demise for the entire term of the sub-lessor amounted to an assignment or transfer. The reasons for treating an underlease of an entire term as an assignment were given in *Beardman* v. *Wilson*. (1) No doubt the sub-lessor may contract with his sub-lessee in a fashion which is analogous to that of a demise. But so far as the property

(1) L. R. 4 C. P. 57.

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in his term is concerned he has none left after he has made what is really a transfer. The respondent was therefore liable on a contract to Ragg and Holmes' executors for the value of any buildings they had erected on the property during the term they had contracted for, and for their crops, stock, and implements. It appears that they had erected buildings and raised crops and put stock and implements on the property during the term. Probably the Colonial Sugar Company had a title to these or some of them, to the extent of their security. The case was obviously one for an arbitration, properly constituted, as provided in each of the leases.

The appellant, however, while making no claim to the stock or implements, declined to recognize in the respondent any title to a valuation of the buildings. His contention appears to have been that he was not bound to pay for any buildings which had been erected only by the sub-lessees as distinguished from the respondent himself, or for any buildings in which the respondent had no interest because of having parted with the whole of his proprietary title under his lease. With this contention their Lordships are unable to agree. It is true that the buildings were erected, not by the respondent personally, but by his assignees. None the less they were erected subject to a covenant in the underlease in the same terms as that in the original lease, by which the respondent bound himself to pay the value to his so-called sub-lessees. He had therefore a material interest in obtaining from the appellant the amount which the latter had contracted to pay to him. The contract enabled the respondent to put up the buildings, and, in the event of there being no extension of his lease, to recover their value. There is, in their Lordships' opinion, no ground for saying that the contract required the respondent to have personally erected the buildings. By the transfer to his sub-lessees he had at least conferred a licence to build and a contractual right to recover from himself, just as he could recover from the appellant, the amount to be ascertained through a valuation of what he himself or others acting with his authority had added to the value of the property.

The action was tried before the acting Chief Justice. That learned judge decided that, there having been no agreement between the appellant and the respondent as to the terms for a renewal, the appellant became liable to pay for the buildings, crops, implements, and stock. He treated the sub-lessees as having been the agents of the respondent in bringing these into existence, and held that the appellant was liable for the amount to be ascertained on a valuation. So far their Lordships are in agreement with him. They agree also with his findings that Costello, his agent, had no authority to bind the appellant as to the valuation to be made, that the appellant would have been entitled to call for a reference, and that the respondent wrongfully resisted the taking of the proper course. But the learned judge went on, after overruling the appellant's repudiation of liability, to make the valuation himself, instead of directing an arbitration to take place in accordance with the terms of the lease. Their Lordships think that he was wrong in treating the question of valuation as one which a Court had jurisdiction to try. The lease provides that the purchase is to take place on valuation, and that if the parties cannot agree on the valuation all matters in difference thereto are to be referred to arbitration, the arbitration to be subject to the provisions of the Common Law Procedure Act, 1854. Their Lordships interpret this as meaning that the amount of the valuation is to be such as may be determined in an arbitration. For then and not until then does a sum, which has to be ascertained in that fashion, become due and capable of affording a right of action. The determination of this sum is not a matter of independent right for which a claimant can go to the Courts. He is entitled only to what the arbitrators award. If this construction be the true one it brings the case within the principle of *Scott* v. *Avery* (1), which decided that while by the common law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no right of action should accrue until a third person had decided the amount to which there was to be a right. This is a principle from

(1) (1856) 5 H. L. C. 811.

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which there is no derogation in the Common Law Procedure Act. It is, in their Lordships' view of the construction of the lease, a case to which the principle laid down in *Scott* v. *Avery* (1) applies, and not that explained in *Dawson* v. *Fitzgerald* (2), where as matter of construction it was held on appeal that there was an independently constituted liability enforceable in the Courts to abstain from doing a particular act, with a separable agreement to refer to arbitration the amount of compensation. The case is therefore one which must go to arbitration and the judgment, so far as it affects to dispose of it otherwise, must be varied accordingly.

The attention of their Lordships was called to the provisions of the Fiji Real Property Ordinance of 1876. It was argued for the respondent that the sub-lease by him could not have operated as a transfer, inasmuch as it was not in the form required by the Ordinance for a transfer. The point is not, however, of any importance, inasmuch as it is the contract between the sub-lessor and his sub-lessees, and not the estate which passed, which is the determining factor. It is accordingly unnecessary to consider the argument that as the sub-lease was de facto registered by the registrar, whether properly or not, it must be construed as a document which the Ordinance does not preclude from being operative.

They will humbly advise His Majesty that the appeal should be allowed by setting aside the judgment for 4544*l.* 10*s.* and costs, and directing the question of valuation to be referred to arbitration, as provided by the lease. As both parties have been in a considerable measure wrong in the contentions they have set up there will be no costs either here or below.

Solicitors for appellant: *Woolley & Whitfield.*
Solicitors for respondent: *Ranger, Burton & Frost.*

(1) 5 H. L. C. 811. (2) L. R. 9 Ex. 7; 1 Ex. D. 257.

[PRIVY COUNCIL.]

JAMIESON . . . . . APPELLANT;

AND

DOWNIE . . . . . RESPONDENT.

J. C.*
1923
June 29.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Claims against Government—Discovery—Right of Crown taken away by Implication—Claims against Government and Crown Suits Act (No. 27 of 1912 N.S.W.), s. 4.

The general words of s. 4 of the Claims against Government and Crown Suits Act, 1912, of New South Wales, reproducing s. 4 of Act No. 30 of 1897, by implication take away the right of the Crown to resist discovery in an action under those Acts upon a claim against the Government.

Judgment of the Supreme Court affirmed.

APPEAL (No. 2 of 1923) from a judgment of the Supreme Court of New South Wales (May 31, 1922).

The respondent brought an action in the Supreme Court of New South Wales against the appellant, who was a nominal defendant appointed by the Government of that State under the Claims against Government and Crown Suits Act, 1912 (N.S.W.); his claim was to recover a sum alleged to be due to him for wages.

A summons for discovery taken out by the respondent was resisted by the appellant on the ground that discovery in an action at law did not lie against the Crown, and the matter was referred by the judge at chambers to the Full Court.

The Full Court (Cullen C.J., Ferguson and Wade JJ.) held (1) that the right of the plaintiff to discovery was the same as in an action between subjects, and remitted the summons to be dealt with accordingly.

The relevant enactments of the State of New South Wales are set out in the judgment of the Judicial Committee.

1923. June 7. *Sir Leslie Scott K.C.* and *Hon. Geoffrey*

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(1) S. R. 22 N. S. W. 121.

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Lawrence, for the appellant, referred to *Thomas* v. *The Queen* (1); *In re La Société Les Affréteurs Réunis and The Shipping Controller* (2); *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (3); *Farnell* v. *Bowman* (4); and *Tobin* v. *The Queen*. (5)

The respondent did not appear.

June 29. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The simple question upon this appeal is whether the right of the Crown to resist discovery in an action has been taken away by s. 4 of the Government and Crown Suits Act, No. 30 of 1897. The Supreme Court of New South Wales has decided this question in the affirmative and the Crown has appealed from their decision.

For the present purpose it is unnecessary to consider whether there are any, and if so, what, limitations and restrictions upon the general right of the Crown to resist discovery. The extent and character of that right does not arise for determination. The only point is, whatever the right be, has it been taken away? By the Act (The Amendment of the Law as to Claims against the Crown Act) No. 27 of 1861, the law with regard to petitions of right was made statutory and the essential principles of the law of England affecting the matter were adopted.

Sect. 7 of that statute enacted that: "So far as the same may be applicable and except in so far as may be inconsistent with this Act the laws and statutes in force as to pleading evidence hearing and trial security for costs amendment arbitration special cases the means of procuring and taking evidence set-off appeal and proceedings in error in suits in equity and personal actions between subject and subject and the practice and course of procedure of the Supreme Court at law and in equity respectively for the time being in reference to such suits and personal actions shall unless the Court shall otherwise order be applicable and apply and

(1) (1874) L. R. 10 Q. B. 44.
(2) [1921] 3 K. B. 1.
(3) [1897] 2 Q. B. 384, 395.
(4) (1887) 12 App. Cas. 643.
(5) (1863) 14 C. B. (N. S.) 505.

extend to such petition of right. Provided that nothing in this Act shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

The decision in the English Courts in *Tobin* v. *The Queen* (1) shows that the words "so far as the same may be applicable" do not take away the rights of the Crown with regard to pleading, and the case *Thomas* v. *The Queen* (2) shows that they do not affect the right to resist discovery.

The statute was, however, repealed by No. 38 of 1876, and this in turn was itself repealed by the Government and Crown Suits Act (No. 30) of 1897.

Sect. 3, sub-s. 1, of that Act provides that: "(i) Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition and the Governor may by notification in the Gazette appoint any person resident in New South Wales to be a nominal defendant accordingly."

Sects. 4 and 5 were in the following terms: 4.—The petitioner may sue such nominal defendant at law or in equity in any competent Court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject. 5.—The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant."

The statute No. 30 of 1897 was repealed by the relevant statute upon the present appeal—namely, The Claims against the Government and Crown Suits Act (No. 27 of 1912), ss. 3, 4 and 8 of which reproduce ss. 3, 4 and 5 of No. 30 of 1897.

The argument for the Crown is that as at the passing of this statute there were undoubtedly existing privileges in

(1) 14 C. B. (N. S.) 505. (2) L. R. 10 Q. B. 44.

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the Crown with regard to discovery, these rights could not be taken away except by express statutory provision or the operation of clear and necessary implication. That proposition might be accepted, but it is subject to this, that the implication may arise from the use of general words which, properly construed, will exclude the right, and this is illustrated by a decision arising under a similar statute containing provisions comparable to those under s. 3, sub-s. 1. One of the rights of the Crown is not to be liable in any action of tort at the instance of a subject. That right is not, by express provision, taken away by the statute except so far as that express provision can be gathered from general words. It has, however, been held by this Board in *Farnell* v. *Bowman* (1) that the phrase "any just claim or demand whatever" includes a claim in tort as well as a claim under contract, and it consequently follows that the Act does materially affect the existing rights of the Crown.

Sect. 4 is again phrased in the most general way. The proceedings and rights of the parties are to be "as nearly as possible" those as between subject and subject. It is urged on behalf of the Crown that this phrase is closely allied to the phrase "so far as the same may be applicable," and that these words had been held to leave the prerogative unaffected. Their Lordships are unable to take this view. "As nearly as possible," in their opinion, refers to the fact that there is a nominal defendant representing the Crown before the Court and that there may be resulting conditions which would prevent the unmodified application of the rules and procedure as between subject and subject. Sect. 5 itself points to this conclusion and shows that in that respect at least the ordinary rules do not apply. Again, the fact that the statute must, in their Lordships' opinion, be taken to leave wholly unaffected the right of the Crown to refuse production of a document which in the public interest ought not to be disclosed, explains the phrase "as nearly as possible" on the assumption that the proceedings and rights of the parties include the usual rights of a litigant party to

(1) 12 App. Cas. 643.

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discovery. Their Lordships can see nothing in the phrase mentioned to destroy the general effect of the preceding words, which are wide enough to create the right claimed in this action, and for the same reasoning that supports the judgment in *Farnell* v. *Bowman* (1) their Lordships think it is not right to limit the wide operation of the general words of the section. The Act was intended materially to change the existing rights of the Crown, and just as it has brought within its ambit actions that were hitherto not permitted, their Lordships think it has included procedure heretofore inapplicable.

For these reasons, they think the judgment of the Supreme Court should be affirmed and this appeal dismissed, and will humbly advise His Majesty accordingly. As the respondent has not appeared there will be no order as to costs.

Solicitors for appellant: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.* 1923. *July* 25.

FORT FRANCES PULP AND POWER COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MANITOBA FREE PRESS COMPANY, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Legislative Power of Dominion—Emergency Legislation—Property and Civil Rights in Provinces—Control of Paper Supply and Prices—Canadian War Measures Act (5 *Geo.* 5, *c.* 2, *Dom.*)—9 *&* 10 *Geo.* 5, *c.* 63, *Dom.*—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.

Under ss. 91 and 92 of the British North America Act, 1867, the Dominion Parliament has an implied power, for the safety of the

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD SUMNER, LORD PARMOOR, and LORD PHILLIMORE.

(1) 12 App. Cas. 643.

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Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the Provinces, from which subjects it is excluded in normal circumstances. The enumeration in s. 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government, which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power:—

Held, accordingly, that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were intra vires.

Judgment of the Appellate Division affirmed on a different ground.

APPEAL AND CROSS-APPEAL (No. 69 of 1923) from a judgment of the Supreme Court of Ontario, Appellate Division (May 8, 1922), affirming a judgment of Riddell J. (March 24, 1922).

The main question in the appeal was whether the Canadian War Measures Act, 1914 (5 Geo. 5, c. 2, Dom.), and certain Orders in Council made thereunder during the war for the control throughout Canada of the supply of newsprint paper by manufacturers and its price, also a further Dominion statute (9 & 10 Geo. 5, c. 63), passed after the cessation of hostilities, for continuing that control until the proclamation of peace, were intra vires the Dominion Parliament.

The facts of the case, in which the respondents were plaintiffs and the appellants defendants, are stated in the judgment of the Judicial Committee, from which the provisions of the statutes in question sufficiently appear.

The trial judge (Riddell J.) held that the statutes and Orders were intra vires under s. 91, head 2 ("regulation of trade and commerce"), and gave judgment for the plaintiffs.

On appeal to the Appellate Division (see 42 Ont. L. R. 118) that judgment was affirmed on the ground that as a matter of contract between the parties the prices finally paid were binding; the Court consequently did not find it necessary to determine whether the Acts and orders were intra vires.

1923. June 22, 25, 26. *Clauson K.C.* and *Cattanach K.C.* for the appellants. The legislation and Orders were ultra vires under the British North America Act, 1867. The Acts clearly trenched upon property and civil rights in the Provinces (s. 92, head 13), and consequently cannot be justified under the general words at the beginning of s. 91 unless they deal with one of the matters enumerated in that section: *Attorney-General for Canada* v. *Attorney-General for Alberta*. (1) The only enumerations in s. 91 which it can be suggested apply are head 2, " the regulation of trade and commerce," and head 7, " . . . . defence." The Acts and Orders went beyond regulation in that they compelled the appellants to supply at lower prices than they could get elsewhere; therefore, they do not fall within s. 92, head 2: *Citizens' Insurance Co.* v. *Parsons* (2); *Russell* v. *The Queen* (3); *The Prohibition Case* (4); *John Deere Plow Co.* v. *Wharton* (5); *Attorney-General for Canada* v. *Attorney-General for Alberta* (6); *Board of Commerce Case*. (7) Even if the Act of 1914 can be justified as " defence " (s. 92, head 7), the respondents' claim rests on the Order of 1920, which can be justified only under the Act of 1919. That Act was passed after the armistice; the Order was made after the Governor-General had declared by Order in Council that " war conditions had long ago ceased to exist." In those circumstances the last cited case is directly applicable to the Act of 1919. Even if s. 6 of the Act of 1914 was valid the Orders went beyond its scope, and the material Order—namely, that of 1920—was invalid under the Act of 1914 in that it was made after the cessation of the war. The ground upon which the Appellate Division decided was not raised by the respondents' pleading; the material before the Court did not establish a contract. The appellants on their counterclaim and cross-appeal are entitled to the sum by which the market price of the paper supplied exceeded the controlled prices paid.

(1) [1916] 1 A. C. 588, 595.
(2) (1881) 7 App. Cas. 96.
(3) (1882) 7 App. Cas. 829.
(4) [1896] A. C. 348.
(5) [1915] A. C. 330.
(6) [1916] 1 A. C. 588.
(7) [1922] 1 A. C. 191, 197.

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[VISCOUNT HALDANE referred to *Hamilton* v. *Kentucky Distilleries Co.* (1); reference was also made on the question of "defence" to *Attorney-General* v. *De Keyser's Royal Hotel* (2); *Robinson & Co.* v. *The King* (3); and *Attorney-General* v. *Wilts United Dairies.* (4)]

Tilly K.C. for the respondents. Having regard to the special circumstances existing in 1914 the Act of that year and the Orders were valid. The paper mills were scattered through the Provinces, and there were newspaper publishers in all the Provinces. The control of the trade, which the evidence shows was necessary, could only be effected by Dominion legislation. Control of prices was a necessary part of the control of the trade. Sects. 91 and 92 must be read so as to enable legislation necessary in existing circumstances to be passed by the Dominion if it cannot be passed effectively by the Provinces. The *Board of Commerce Case* (5) recognizes that exceptional circumstances, such as those arising from war, may take a subject out of the enumeration in s. 92 and into the general words of s. 91. The Act of 1919 was passed by the Dominion to wind up transactions arising under emergency legislation which it had validly passed. Even if the Orders were invalid, the Appellate Division rightly held that the appellants were bound by contract. They submitted to the jurisdiction of the tribunal, and applied to it for increases of prices.

Clauson K.C. replied.

July 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal raises questions of some novelty and delicacy.

The appellants are manufacturers of newsprint paper in Ontario, and the respondents are publishers of newspapers, carrying on business at various places in Canada. The action out of which the appeal arises was brought by the respondents against the appellants to recover sums the former had paid for

(1) (1919) 251 U. S. 146.
(2) [1920] A. C. 508, 529.
(3) [1921] 3 K. B. 183, 197.
(4) (1922) 127 L. T. 822.
(5) [1922] 1 A. C. 191, 197.

paper delivered to them at controlled prices. These sums, which the respondents alleged to represent margins in excess of the prices regulated by law, they claimed to be repayable to them as the result of orders of the Paper Control Tribunal of Canada, the final order having been made on July 8, 1920. The sums represented the amounts due after an adjustment of accounts in accordance with the above-mentioned final order and previous orders which it modified. For the balance so arrived at the action was brought in the Supreme Court of Ontario. It was tried before Riddell J., who gave judgment for the plaintiffs, the respondents.

No question was raised as to figures, and the learned judge treated the question before him as being only whether the Paper Control Tribunal and the Paper Controller, from whose orders the Paper Control Tribunal was in effect a Court of Appeal, had been validly vested with power to make the orders in controversy. The judgment of Riddell J. was made the subject of an appeal to the Appellate Division of the Supreme Court, which affirmed the judgment of the trial judge. There was a counterclaim by the appellants for the amount of the market prices of the paper delivered by them to the respondents, less the sums actually paid. This was dismissed by Riddell J., the dismissal being consequential on his view that the Orders were valid. The Court of Appeal did not think it necessary to go into this question of validity, for they considered that notwithstanding that pressure was put on the appellants to supply the paper at the prices fixed by the Orders, they did send out invoices and supply it, and thereby in effect entered into contracts for such supply on the terms that the prices were provisional and to be finally adjusted in terms of the Orders to be made by the Paper Control Tribunal. On that footing nothing was, in the event, due on the counterclaim. Whether the action of these tribunals was legal or not, the appellate Court therefore held that the appellants, notwithstanding that they had acted under pressure, had bound themselves to accept the prices fixed and were liable.

Their Lordships have not been able to satisfy themselves

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that this view was a reliable one. The tribunals exercised control not only over prices but over the supply of the paper itself, and were in a position to exercise, and did exercise, pressure which was practically irresistible. There is evidence of its character in the present case, and the appellants contend that if the case is to be decided on the footing on which it was decided by the appellate Court—a footing which would be material only on the hypothesis that the Orders were invalid—it should be sent back for a new trial. Their Lordships think that this contention cannot be lightly overruled. But if the Orders were not invalid but valid, and the tribunals really possessed the powers they claimed to exercise, the question does not arise. It is therefore necessary to consider in the first place the validity of the legislation and Orders in Council by which the controlling tribunals were set up and invested with the powers exercised.

Purporting to act under the provisions of the War Measures Act passed by the Parliament of the Dominion in August, 1914, the Governor-General made an Order in Council, dated April 16, 1917, authorizing the Minister of Customs to fix the quantity and price of newsprint paper in sheets or rolls furnished or to be furnished to those who required it for publishing. The Order was to be operative from March 1, 1917, to June 1 in the same year. By further Orders this power was extended to December 1 in that year. Acting in accordance with these Orders the Minister ordered deliveries and fixed prices, and this procedure continued until Mr. R. A. Pringle K.C. was, by Order in Council dated November 3, 1917, appointed Controller as well as Commissioner, with power to fix the quantities to be delivered and the prices, such prices, however, to be approved by the Governor-General in Council.

By various Orders Mr. Pringle fixed prices for a period extending from July 1, 1918, to December 1 in that year. By Order in Council dated September 16, 1918, prices were directed no longer to be supervised by the Governor in Council, inasmuch as a new tribunal called the Paper Control Tribunal was set up, and a right of appeal to it from any Order of the

Controller was given. The Paper Control Tribunal made various Orders on appeals from the Controller, and on July 8, 1920, made an Order fixing a price for a period ending on December 31, 1919, and directing the appellants to refund all sums received in excess of the prices fixed. It was the amount of the excess that was the subject of the present action.

On the construction and validity of these Orders points have been made in argument, but the most general question to be decided is definitely raised by the appellants, and is whether the Orders in Council, the statutory basis on which they rest, and the proceedings founded on them by the Controller and the Paper Control Tribunal, were intra vires of the Dominion executive and Legislature.

So far as the relevant legislation of the Parliament of the Dominion is concerned, this consists of two statutes. The first of these is the War Measures Act, 1914. It enacts that the provisions of s. 6 (to be presently referred to) are only to be in force during war, invasion or insurrection, real or apprehended. The issue of a Government proclamation is to be conclusive evidence that these exist and are continuing, until the issue of a subsequent proclamation declaring them to exist no longer. War is to be deemed to have existed since August 4, 1914. By s. 6 the Governor in Council is to have power to do and authorize such acts and things and to make such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada. These powers are to extend, among other matters, to trading, exportation, importation, production, manufacture, and also to appropriation, control, forfeiture, and disposition of property and of its use.

By a later Act of the Dominion Parliament, passed on July 7, 1919, relating to paper control, after referring to certain of the Orders in Council already mentioned and to the War Measures Act of 1914, on the recital that there had been investigations and work begun by the Paper Commissioner and Controller which were not completed, and with respect

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to which appeals would lie to the Paper Control Tribunal, and that there were then matters pending before and undetermined by that tribunal, it was enacted that the powers, jurisdiction and authority of the Commissioner and Controller of Paper were confirmed and extended so as to enable him to complete all work and investigations begun by him prior to the declaration of peace, and to determine all questions and to make all necessary Orders with respect to matters coming before him prior to the publication in the Canada Gazette of a proclamation by the Governor in Council declaring the war to no longer exist.

It was further enacted that the powers, jurisdiction and authority of the Paper Control Tribunal were so confirmed and extended as to enable it to determine finally after the declaration of peace all matters pending before and not finally determined by it at the date of such declaration, and to dispose of all appeals brought before it subsequent to such declaration from any act done by or order or decision of the Commissioner and Controller under the Act. It was also provided that, except for the purpose of finally completing all matters undertaken, and determining all matters arising prior to the declaration of peace, the powers, the authority and jurisdiction of the Commissioner and Controller of Paper and of the Paper Control Tribunal should cease upon the publication of the said proclamation.

It is not clear that any such proclamation as above defined was issued. There was an Order made by His Majesty in the Imperial Privy Council on February 9, 1920, and published in the Canada Gazette on the same date, declaring January 10, 1920, as the date of the termination of the war with Germany. But there was war with other countries to which this Order did not relate, and of a proclamation as to these no evidence has been produced.

Their Lordships do not, however, consider this to be in itself important. For it is clear that on July 8, 1920, the Paper Control Tribunal when it made the Order under which the claim in this action arose, made it on an appeal from an Order of Mr. Pringle, the Controller, dated December 24,

1919. The Order on appeal of July 8, 1920, disposed of matters down to December 31, 1919. It altered certain prices governing periods, which prices the Controller had fixed in the past, increasing some of these and diminishing others, and directed any excess thus brought out of amounts charged by the appellants to be repaid, subject to set-off.

Their Lordships think that the effect of these Orders, assuming the Dominion Government and Legislature had authority to make them, was to render the appellants liable to account for the balance of the prices received by them from time to time up to the end of 1919 in excess of what was ultimately allowed, on the footing of being money had and received to the use of the respondents. No question arises as to figures, and the Orders are in such a form that they must be taken as intended to operate retrospectively.

The question, therefore, becomes one of constitutional law, as to whether the procedure thus established had a valid basis. This depends, in the first place, on whether the two statutes already quoted were intra vires of the Dominion Parliament.

It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* (1), as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been normal. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* (1) recognize exceptional cases where such a power may be implied.

In the event of war, when the national life may require

(1) [1922] 1 A. C. 191.

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for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires s. 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

The overriding powers enumerated in s. 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within s. 91, because in their fullness they extend beyond what s. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. This principle of a power so implied has

received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom.

Their Lordships, therefore, entertain no doubt that however the wording of ss. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in s. 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down a priori, nor is it necessary. For in the solution of the problem regard must be had to the broadened field covered, in case of exceptional necessity, by the language of s. 91, in which the interests of the Dominion generally are protected. As to these interests the Dominion Government, which in its Parliament represents the people as a whole, must be deemed to be left with considerable freedom to judge.

The other point which arises is whether such exceptional necessity as must be taken to have existed when the war broke out, and almost of necessity for some period subsequent to its outbreak, continued through the whole of

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the time within which the questions in the present case arose.

When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton* v. *Kentucky Distilleries Co.* (1)

When then, in the present instance, can it be said that the necessity altogether ceased for maintaining the exceptional measure of control over the newspaper print industry introduced while the war was at its height ? At what date did the disturbed state of Canada which the war had produced

(1) 251 U. S. 146.

so entirely pass away that the legislative measures relied on in the present case became ultra vires? It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal. No doubt late in 1919 statements were made to the effect that the war itself was at an end. For example, in the Order in Council made at Ottawa on December 20, 1919, it is stated that it must "be realised that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada."

The Order in Council then goes on to say that in consequence of the armistice of November, 1918, the Expeditionary Force had since been withdrawn and demobilised, and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace. In these circumstances, it states, the Minister of Justice considers that the time has arrived when the emergency Government legislation should cease to operate. This was in December, 1919. The Order then goes on to declare repealed all Orders and Regulations of the Governor in Council which depend for their sanction upon s. 6 of the War Measures Act, 1914, and repeals them as from January 1, 1920. But from this repeal it expressly excepts, among other Orders and Regulations specified, those relating to paper control, which are to remain in force until the end of another session of Parliament.

It will be observed that this Order in Council deals only with the results following from the cessation of actual war conditions. It excepts from repeal certain measures concerned with consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over.

Their Lordships find themselves unable to say that the

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Dominion Government had no good reason for thus temporarily continuing the paper control after actual war had ceased, but while the effects of war conditions might still be operative. They are, therefore, unable to accept the propositions submitted to them in the powerful argument for the appellants. The reasons which bring them to this conclusion are not those of the Appellate Division of Ontario, which proceed on the hypothesis of a contract entered into by the appellants, a hypothesis which their Lordships are unable to entertain on the mere materials before them. Their reasons are more nearly those of the trial judge, Riddell J., although they desire to guard themselves from being regarded as accepting the suggestion made by that learned judge that "all the powers exercised by Minister, Controller and Tribunal were intra vires and valid, even in a state of profound peace."

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs. A petition by the appellants for leave to adduce further evidence will also be formally dismissed with costs.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondents : *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

JASPERSON . . . . . APPELLANT; J. C.*

AND 1923

DOMINION TOBACCO COMPANY . . RESPONDENTS. *July* 6.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Cause of Action—Principal and Agent—Third Party inducing Agent to commit Breach of Duty—Damage to Principal—Liability of Third Party.

The respondents employed D. as their agent to buy tobacco from growers, the total bought not to exceed 300,000 lbs., and supplied him with forms of contract bearing their firm name as buyers. D. agreed not to act as buying agent for anybody except the respondents and another firm. The appellant, who knew the position as between D. and the respondents, induced him to buy in the names of the two firms a total of 1,100,000 lbs., arranging with him to take over the surplus not required for them. Out of that total weight D. handed 300,000 lbs. to the respondents, and tendered the balance to the appellant; but he repudiated the arrangement, the market having fallen heavily. The respondents having also repudiated liability, one of the vendors, with whom D. had contracted upon the respondents' form, was held to be entitled to damages from the respondents as having held out D. as their agent; the respondents claimed to recover over from the appellant:—

Held, that the respondents were so entitled, the appellant having knowingly induced D. to commit a breach of his duty to them, whereby they had suffered the damage.

Lumley v. *Gye* (1853) 2 E. & B. 216 and *Quinn* v. *Leathem* [1901] A. C. 495 applied.

Judgment of the Appellate Division affirmed.

APPEAL (No. 67 of 1923) from a judgment of the Appellate Division of the Supreme Court of Ontario (March 31, 1922) affirming a judgment of Middleton J., whereby the appellant Jasperson, as third party, was ordered to pay to the respondents, the Dominion Tobacco Company, $5177 which, by the judgment, they were ordered to pay to the plaintiff in the action.

The facts appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD PHILLIMORE.

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1923. June 18. *Rodd K.C.* for the appellant.
Tilly K.C. and *G. T. Walsh* for the respondents.

1923. July 6. The judgment of the Judicial Committee was delivered by

VISCOUNT HALDANE. This is an appeal from the Supreme Court of Ontario, which has affirmed a judgment of the trial judge, Middleton J. The effect of the judgment is to enable the respondent company to recover over from the appellant as third party a sum of $5177, which the respondent company has been ordered to pay to the plaintiff in an action, brought by one Peterson against the respondent company and others, to recover damages for failure to accept delivery of tobacco contracted to be sold to it. There were other actions concerned with claims under analogous contracts which were tried along with the present case, but as to these no question arises on this appeal, nor are their Lordships concerned with any question in the present case other than the claim to recover over made by the respondent company against the appellant.

The circumstances under which the claim to recover over arose were briefly these: The respondent company was a firm having its head office at Montreal, and the MacDonald Company was an incorporated company having its head office in the same city. The Foster Tobacco Company was also an incorporated company, and had its head office at Leamington in Canada. The appellant Jasperson was a dealer in tobacco, carrying on a large business at Kingsville in the Dominion. Deacon was a comparatively young man, formerly in the employment of Jasperson and more recently in that of the Foster Company. At the time of the events which gave rise to the claim he was also a purchasing agent for the respondent company.

In 1919, in the tobacco-growing region in Canada with which this case is concerned, it was at first thought that the seasonal crop would be short of the supply required, but later on the conditions of growth became very favourable, and as the result prices fell.

Deacon had been employed by the respondent company, in June, 1919, as its agent to buy tobacco, and he had undertaken not to act as buyer for any other concern except the Foster Company. He was supplied by the respondent company with printed forms on which he was to contract with the tobacco growers. The name "Dominion Tobacco Company" was printed in the body of these forms of contract, and, at the end, as the signature of the purchaser. Jasperson was the agent, with very wide authority, to purchase on a large scale tobacco for the MacDonald Company, and to make such arrangements as he could for that purpose. In 1919 he desired to buy very large quantities of tobacco for his company. Doubtless because their open competition in the market would have the effect of raising prices, he wished to buy through others than himself. He knew the position of Deacon and the arrangement the latter had with the Dominion and Foster Companies, and he also knew that he had been given the forms of contract referred to. Deacon was directed by the Dominion Company to buy for them not more than 350,000 lbs., an amount which was reduced later to 300,000. But although this limitation was made it did not appear in the advertisements of his authority as agent, nor in the terms of any form of contract or other documents which a seller dealing with him would see. As against a seller having no notice of it who sold to the Dominion Company through Deacon a larger quantity, the limitation would therefore be inoperative. Jasperson, as has already been observed, knew the position of Deacon in relation to the two companies for which he was acting.

The learned trial judge has made certain findings of fact in which the Court of Appeal have concurred, and which their Lordships have no reason to question. The material findings are that Deacon was instructed by Jasperson to purchase for him a large quantity of tobacco in the names of the Dominion and Foster Companies; that he reported to him purchases so made from day to day during the buying season, and that these were all approved by Jasperson. In the names of the Dominion and Foster Companies, Deacon in this way purchased

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tobacco amounting to 1,100,000 lbs. Out of this amount he handed 300,000 lbs. to the Dominion Company. The remainder, amounting to 800,000 lbs., he proffered to Jasperson, but the latter repudiated the arrangement. There had been a heavy fall in prices.

As the result of the repudiation the sellers, being unable to get their money, sued the Dominion Company. The present action was brought by a seller named Peterson. He recovered from the respondent company the sum already stated as damages, measured by the difference between his contract price and that at which it was possible to realize by selling. But in the course of the proceedings the company served on Jasperson a third party notice, under the Procedure Rules which obtain in Ontario. These are wider in scope in this connection than the corresponding procedure rules in England, for they enable the claimant under a third party notice to claim not only contribution or indemnity but any other relief over. Under this procedure, to which no exception was taken in the Courts below, these Courts have ordered that the respondent company recover against the appellant Jasperson the money which the company had been liable to pay to the plaintiff Peterson.

Their Lordships think that this order, the only order made as to which any question arises in the appeal, was right. Jasperson must be taken to have known that Deacon was not at liberty to purchase for him or for the MacDonald Company whom he represented, and that he had no authority to purchase quantities largely in excess of his instructions from the respondent company. By inducing Deacon to violate his duty to the respondent company he has occasioned to them a loss which their Lordships consider that he was rightly ordered to make good. The reason on which this conclusion rests is one which is now well established. Interference directed to bringing about a violation of legal right, such as that of the respondent company to have their contract with Deacon duly observed, is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

It is an illustration of this principle when the interference is directed to inducing an agent to act in contravention of his duty by pledging his principal's credit. What was laid down long ago in *Lumley* v. *Gye* (1) reaches all wrongful acts done intentionally to damage a particular individual, and actually damaging him. The law as thus stated was explained by the House of Lords in *Quinn* v. *Leathem* (2), and in their Lordships' opinion it applies in the case before them. The right of the respondent company arises out of a tort, for the consequences of which the appellant was bound to compensate them. A legal foundation for the right of the respondent company to claim over against the appellant might be put in other ways, but their Lordships think that in whatever form it is put the result will be the same, for the damages will be at least as great as the amount for which the claim over was made.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

(1) (1853) 2 E. & B. 216. (2) [1901] A. C. 495.

[PRIVY COUNCIL.]

J. C.* 1923 July 20.

THE KING AND THE PROVINCIAL TREASURER OF ALBERTA . . . } APPELLANTS;

AND

CANADIAN NORTHERN RAILWAY COMPANY AND ANOTHER . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Taxation of Railways—Exemption—Construction of Provincial Act—"Any statute"—Penalties—Limitation—"Party grieved"—Relief from Penalties—3 & 4 Will. 4, c. 42, s. 3—Alb. Stat. 1909, c. 5, s. 10.

The Alberta Statutes for 1906 by c. 30 imposed a tax upon every railway company using or operating a railway within the Province, but Alb. Stat., 1909, c. 5, s. 12, exempted railways aided by a guarantee of debentures under "any statute." The Act of 1906 also provided that returns should be made to the Provincial Treasurer of the number of miles of railway within the Province owned or operated, whether exempt from taxation or not; upon default penalties and double taxation were imposed, the Provincial Treasurer being empowered to sue for them:—

Held, that the words "any statute" in the Alberta Statute of 1909 included a Dominion statute.

Held, further, that the Provincial Treasurer was a "party grieved" within 3 & 4 Will. 4, c. 42, s. 3, and that his claim to penalties was thereby limited to two years' default; the claim in the name of the Crown was similarly limited by 31 Eliz. c. 5.

Held, further, that the penalties being imposed by statute, the Court had no power to grant relief under an Alberta statute empowering it to relieve from "penalties and forfeitures."

Judgment of the Supreme Court of Canada affirmed.

APPEAL AND CROSS-APPEAL (No. 114 of 1922) from a judgment of the Supreme Court of Canada (June 17, 1922) (1), reversing a judgment of the Appellate Division of the Supreme Court of Alberta (April 28, 1921), which reversed a judgment of Hyndman J.

The appeal arose out of an action brought by the appellants against the respondent railway company claiming taxes,

* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD PHILLIMORE.

(1) 64 Can. S. C. R. 264.

also double tax and penalties, under Alb. Stat., 1906, c. 30. The respondents claimed exemption from the tax under Alb. Stat., 1909, c. 5, s. 10. The facts of the case, the relevant statutory provisions, and the effect of the judgments in Canada appear from the judgment of the Judicial Committee. The appeal to the Supreme Court is reported at 64 Can. S. C. R. 264.

1923. June 19, 21, 22. *Jowett K.C.*, *Parlee K.C.* and *Hon. Geoffrey Lawrence* for the appellants.

Clauson K.C., *Neil Maclean K.C.* and *W. Gordon Brown* for the respondents.

July 20. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellant, the Provincial Treasurer of Alberta, is designated, in s. 5 of ch. 30 of the Statutes of Alberta for 1906, as a person in whose name an action can be brought to recover any such penalty or "double tax," as is therein referred to, in any Court of competent jurisdiction. The respondents, the Canadian Northern Railway Company, own and operate railways throughout Canada, and had at all relevant times, as part of their system within the Province of Alberta, two lines, one extending from Lloydminster to Edmonton, a distance of 169 miles, and another from Edmonton to Strathcona, a distance of 7·23 miles. The respondents, the Canadian National Railway Company, denote a system of railways to which the name was applied by Order in Council when the control thereof was acquired by the Government of the Dominion of Canada.

In the first year of its existence the Province of Alberta, under an Act of 1906, imposed a tax on every person, company, or corporation owning or operating a line of railway, or part thereof, within the Province, not exempt from taxation. The respondents, the Canadian Northern Railway Company, own and operate a line, or part of a line of railway within the meaning of this statute, but a question has arisen whether they are exempt within the proviso of s. 12 of the Act: "Provided, however, that no tax shall be payable under this

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Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock or other securities under the provisions of any statute for a period of fifteen years from the date of the commencement of the operation of the portion of the line so aided, and thereafter during the currency of the guarantee as aforesaid the amount of taxes payable hereunder upon or with respect to such portion of any line of railway so aided shall not exceed an amount equal to $30 per mile of the mileage of such portion of such line in the Province."

The first question to be determined on the appeal is whether the line of railway between Lloydminster and Edmonton comes within this proviso. This railway was aided by a guarantee under the provisions of a Dominion statute, but it is said that the word " statute," in the proviso, is limited to a statute of the Province, and that, as no guarantee has been given under the provisions of a Provincial statute, the exemption does not apply. The railway from Edmonton to Strathcona is not aided by any similar guarantee, and it is not argued that the exemption of the proviso extends to this line. The proviso was amended in 1918 by inserting after the word " statute " the words " of the province," so that, if the exemption extended to this date, it was then taken away. It was further argued that this section of the Act of 1918 might be regarded, either as declaratory of the meaning of the then existing statute, or as retrospective in its operation, but this was not the main point on which the appellants relied. In the opinion of their Lordships this amendment does not affect the interpretation of the words " any statute " in the proviso to the said s. 12, although no doubt it is clear that, from the date of the amendment, no exemption can be claimed, on the ground that a line of railway in Alberta, has been aided, by a guarantee, under the provision of a Dominion statute. It should be added that the proviso of the said s. 12 was itself inserted, as an amendment, by ch. 5 of the Statutes of Alberta, 1909.

There has been considerable difference of judicial opinion as to the meaning of the words " any statute " in the proviso.

It has been argued that unless the words are limited to a statute of the Province, they might apply to any statute enacted by any outside legislative authority, an extension which the Legislature of Alberta cannot have contemplated. It is further argued that in an Act of the Legislature of Alberta the word "statute" is naturally limited to an Act of that Legislature, and that whether the amendment in the Act of 1918 is declaratory or not, it is in accord with the true meaning of the original proviso. The Chief Justice of the Appellate Division of the Supreme Court of Alberta has given a powerful judgment in favour of restricting the words "any statute" to a statute of the Provincial Legislature, and says that it scarcely needs argument to satisfy any one that the reason why a railway is exempt is not because it has received aid, and is therefore better able to pay taxes, but that it would advantage the Province little to collect from a railway company taxes which it would require to pay back in satisfaction for debts. With this judgment Stewart J. concurs, but Beck J. expresses a contrary opinion. In the Supreme Court of Canada Idington and Anglin JJ. agree in the judgment of the Appellate Division of the Supreme Court of Alberta, but the majority, Duff, Brodeur and Mignault JJ., hold that the words "any statute" include a Dominion statute, and it is against this judgment that the appeal is brought.

In 1909, when the proviso was introduced by the Alberta Legislature, both that Legislature and the Dominion Legislature, within the respective spheres of their jurisdiction, had jurisdiction to guarantee the bonds, debentures, debenture stock or other securities in aid of a portion of a line of railway within the Province of Alberta. A railway company, therefore, might receive this form of aid, either under the provisions of a statute of the Province, or of a statute of the Dominion, and so far as statutory power is concerned, no distinction arises. In either case there is a statute within the ordinary meaning—namely, an Act of a Legislature having legislative authority within the Province. The words "any statute" would be applicable by whichever of the two

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legislative authorities a statute in a particular case has been enacted. Their Lordships, therefore, are of opinion that in their natural ordinary sense the words "any statute" in the proviso would include a Dominion statute, without raising any implication that it would also include a statute enacted by some outside authority, with no jurisdiction to legislate within the Province. It is hardly necessary to quote authority that the grammatical and ordinary sense of the words in statutes is to be adhered to unless they would lead to absurdity, repugnancy or inconsistency with the rest of the instrument. Their Lordships can find no trace of any such absurdity, repugnancy or inconsistency in the present instance, and consequently in construing the words "any statute" there is no reason for making any conjecture as to the motives which may have actuated the Province in enacting the proviso. On this point their Lordships agree with the judgment of the majority in the Supreme Court of Canada. The result is that the respondents are entitled to recover taxes for the years 1918 and 1919 on the line from Lloydminster to Edmonton, and for the years preceding 1918 on the line from Edmonton to Strathcona. Some question was raised as to the valuation on which the taxation should be assessed, but ultimately it was not suggested that the valuation should be other than that of the Order in Council, August 29, 1908, as adopted in the judgment of the Supreme Court of Canada.

The second question raised on the appeal is whether the English Statutes of Limitation, 18 Eliz. c. 5, 31 Eliz. c. 5, and 3 & 4 Will. 4, c. 42, s. 3, apply to an action for penalties sought to be recovered by the King and the Provincial Treasurer of Alberta, as joint plaintiffs, under a Canadian Provincial statute, for failure to comply with certain statutory provisions. Having regard to the designation of the Provincial Treasurer, as the person in whose name any penalty or double tax might be recovered with costs in s. 5 of the Act of 1906, there appears to be no reason why the King should be added as a party. Sect. 4 of the Act of Alberta, 1906, enacts that any company owning or operating

a line or part of a line of railway within the Province, comes under obligation, without any notice or demand to that effect, to deliver in duplicate to the Provincial Treasurer, in each year a written statement showing the number of miles of railway line, whether or not such line or part thereof is or is claimed to be exempt from taxation of the Province, specifying the number of miles so exempt, or claimed to be, and the authority under which such exemption is claimed. It is common ground that no such statement was submitted to the appellants in respect of either line. Sect. 5 enacts that any company in default shall be liable to a penalty of $20.00 per day for each day in which default is made, and shall also be liable to pay a tax for double the amount, for which such company would have been liable under the Act, and that any such penalty or double tax may be recovered in any action brought in the name of the Provincial Treasurer. Their Lordships agree in the opinion expressed by all the judges in the Supreme Court of Canada that the "double tax" sought to be recovered is in the nature of a penalty, imposed for non-compliance with the statutory provisions in s. 4 of the Act of 1906. The question therefore arises whether the limitations imposed in the English statutes are applicable. It would be convenient to consider first 3 & 4 Will. 4, c. 42. This statute provides that all actions for penalties given to the "party grieved" by any statute, now, or hereafter to be in force, shall be commenced and sued within one year after the end of the then present session, or within two years after the cause of such action or suit. The only question which arises is whether the Provincial Treasurer of Alberta is a "party grieved." The Provincial Treasurer, being the designated person, to whom the statement is required to be sent in duplicate, stands in a position distinct from that of a common informer, or of a member of the public who may desire to obtain the information as specified in s. 4. He requires this information, in his official capacity, in order to know whether an exemption from taxation exists, or is claimed to exist, and the withholding of this information from him places him at a disadvantage

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in the effective carrying out of his public duties. It is immaterial that, in the particular case, he may have the information from other sources. He is entitled in all cases to an annual written return from the railway company. He has a special interest of a distinct character, and, in the opinion of their Lordships, comes within the words "party grieved." These words have no special technical meaning, but should be construed in their ordinary sense. Each case will depend on the special circumstances. In *Boyce* v. *Higgins* (1) it was held that the person suing for the penalty had no more interest than any other member of the public, and that the defendant was entitled to judgment. Jervis C.J. says that a public grief will not do for the plaintiff, and Maule J. says that the plaintiff must point out some such grievance as the person does who sues for a grievance created by nuisance to a highway. A patriotic person who comes forward to sue, but who is only aggrieved as the whole public are, is not entitled to sue. In the case of *Robinson* v. *Currey* (2) it was held, in the Court of Appeal, reversing the judgment of the Queen's Bench Division, that an officer of the Company of Goldsmiths was not a "party grieved" when suing for penalties under 7 & 8 Vict. c. 22, s. 3. In the Court of Appeal Lush L.J. says, "they must be parties actually grieved, that is, parties who have sustained some damage by reason of the act done for which the penalty is fixed." Their Lordships are of opinion that the Provincial Treasurer did receive some damage by reason of the withholding of the statutory statement, and that he was a party actually grieved. The statute of Elizabeth enacts that all actions which shall be had, brought, sued or exhibited for any forfeiture upon any statute penal made or to be made whereby the forfeiture is, or shall be, limited to the Queen, her heirs, or successors only, shall be brought within two years after the offence, and not after two years. This section imposes the same period of two years' limitation on the claim of the King, as the statute of s. 3 of 3 & 4 Will. 4 imposes against the Provincial Treasurer.

(1) (1853) 23 L. J. (C. P.) 5, 8.
(2) (1880) 6 Q. B. D. 21; (1881) 7 Q. B. D. 465, 475.

Their Lordships concur in the unanimous opinion in this respect expressed by the Supreme Court of Canada. This matter does not appear to have been considered when the case was before the Appellate Division of the Supreme Court of Alberta, and is consequently not referred to in the judgments of that Court. Having regard to the statutory authority which enables the Provincial Treasurer to bring an action in his own name for penalties or double tax, there does not appear to be any reason why the King should have been added as a joint plaintiff, and no argument was addressed to their Lordships that it was necessary to add the King as a joint plaintiff.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court of Canada should be confirmed with costs.

On the cross-appeal of the respondents three questions are raised: (1.) That the railway from Edmonton to Strathcona is entitled to similar exemption from taxation as the railway from Lloydminster to Edmonton, on the ground that a money subsidy has been received from the Dominion. This question was not argued before their Lordships. It is clear, however, that a money subsidy does not come within the terms of the exemption section.

(2.) That certain orders of the Lieutenant-General in Council fixing the value and length of the respondents' lines of railway, for the purposes of taxation, are ultra vires. There appears to be no ground for this contention, and had it been successful, the only result would be to increase the amount for which the respondents might be held liable.

(3.) That under sub-s. 8 of s. 2 of the Act of 1907, amending the Judicature Ordinance of the North-West Territories, the Court has power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the Court sees fit. Hyndman J., in the Court of first instance, held, after argument, that this provision authorized him to relieve the respondents against any liability for penalties, and that the case was a proper one in which

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relief should be granted. In the Appellate Division of the Supreme Court of Alberta the judges were unanimous in holding that the power given to the Court to relieve from penalties did not authorize relief against statutory penalties. They followed the decisions of *McHugh* v. *Union Bank of Canada*. (1) The Chief Justice expresses the opinion that if the power given to the Court to relieve against penalties applied to statutory penalties, this would, in effect, be giving an authority to enable the Court to repeal statutes. This decision was unanimously confirmed in the Supreme Court of Canada. Idington J. says in his judgment " that the power in the Court to relieve from penalties seemed to him to be applicable only to such contractual penalties, and forfeitures as those as to which the Court of Chancery had exercised jurisdiction." Their Lordships are of opinion that on this point the cross-appeal fails. They will humbly advise His Majesty that the cross-appeal should also be dismissed with costs. There will be a set-off in respect of the costs.

Solicitors for appellants : *Lawrence Jones & Co.*
Solicitors for respondents : *Linklaters & Paines.*

(1) (1910) 3 Alb. L. R. 166.

Explained. ELECTRIC AND MUSICAL INDUSTRIES, LTD. *v.* I.R. COMRS. [1950] 2 All E.R. 261.

[HOUSE OF LORDS.]

GAS LIGHTING IMPROVEMENT COMPANY, LIMITED . . . . . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE . . . . . } RESPONDENTS.

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Revenue—Excess Profits Duty—Computation of Capital—Percentage Standard—Income received from Investments—Capital of Trade or Business—Deduction—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *ss.* 40, 41; *Sch. IV., Part I., r.* 8; *Part III., r.* 2.

Part III., r. 2, of Sch. IV. to the Finance (No. 2) Act, 1915, provides that, in estimating the capital of a trade or business for the purpose of ascertaining the percentage standard for excess profits duty, any capital the income on which is not to be taken into account for the purpose of Part I. of the same Schedule (computation of profits) is to be deducted; and r. 8 of Part I. provides that, in estimating the profits of a trade or business, no account shall be taken of the income received from investments, except in the case of life assurance businesses and businesses where the principal business consists of the making of investments.

A company, whose business consisted in procuring, refining, and distributing petroleum and petroleum spirit, with a view to forwarding its trading operations, and, in particular, to ensuring a supply of crude oil, acquired shares in certain foreign companies trading in petroleum:—

Held, that for the purposes of excess profits duty, these shares were "investments" the income of which was not to be taken account of in estimating profits, and consequently that the value of the shares must, in estimating the capital of the business for the purpose of ascertaining the percentage standard, be deducted.

Decision of the Court of Appeal [1922] 2 K. B. 381 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Sankey J. upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The appeal related to the method of ascertaining the amount of capital of the trade or business of the appellants in order to compute the percentage standard for the purpose

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE.

(1) [1922] 2 K. B. 381.

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of excess profits duty under the Finance (No. 2) Act, 1915. The question shortly stated was whether the shares and debentures of certain foreign companies held by the appellants were "investments" within the meaning of r. 8 of Part I. of the Fourth Schedule to the Act, so as to exclude the dividends and interest thereon from the profits chargeable and the investments themselves from the capital of the trade or business in pursuance of r. 2 of Part III. of the Fourth Schedule.

The special case, so far as material, is set out in the report of the proceedings before the Court of Appeal and the facts sufficiently appear from the judgment of the Lord Chancellor.

The assessment appealed against proceeded on the view that these shares and debentures were "investments" within the meaning of r. 8 of Part I. of the Fourth Schedule to the Act, and were, under r. 2 of Part III. of the same Schedule, to be deducted in computing the amount of the appellants' capital for the purposes of the Act. On appeal, the Commissioners for General Purposes held that the money employed in the foreign companies was employed in the business of the appellant company as capital and not as an investment, and they allowed the appeal.

Sankey J. affirmed the determination of the Commissioners, but the Court of Appeal (Lord Sterndale M.R., Scrutton and Younger L.JJ.) reversed his decision, and held that the holdings were "investments" within the meaning of r. 8 of Part I. of the Schedule and should be deducted from the appellants' capital.

1923. April 19, 20. *Sir John Simon K.C.* and *Latter K.C.* for the appellants. On the true construction of r. 8 of Part I. of the Fourth Schedule to the Finance (No. 2) Act, 1915, the expression "income received from investments" is limited to income arising from those forms of capital which are not employed in the trading operations for which the business was constituted and to income which is not dependent on the result of those trading operations, and the limitation of the capital excluded by r. 2 of Part III. is

coterminous. The profits of a company obtained through the holding of stock or shares in another company may be profits of its trade or business assessable to excess profits duty; such profits are not necessarily income derived from investments. It is a false classification to say that stocks or shares are necessarily investments within the meaning of r. 8. The contrast is between what is being done in carrying on the business and the investment of money lying idle. Where money is employed in advancing the interests of a business it is capital of the business and not an investment: *Usher's Wiltshire Brewery* v. *Bruce.* (1) [They also referred to *Smiles* v. *Australasian Mortgage and Agency Co.* (2); *Reid's Brewery Co.* v. *Male* (3); *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (4)] The holdings in the Roumanian and Belgian Companies are really not investments at all, but are in substance merely machinery to enable the appellants to provide supplies of crude oil for the purposes of their business and to carry on more effectively that part of their previous business which consisted in selling and distributing petroleum spirit in Belgium. The Commissioners for the General Purposes of the Income Tax Acts have found the facts in the appellants' favour.

Sir Ernest Pollock K.C. and *Reginald Hills* (*Sir Douglas Hogg A.-G.* with them) for the respondents. The holdings of the appellant company in these foreign concerns are investments in the ordinary sense of the term, and it is in that sense that the word "investments" ought to be construed in r. 8. Money invested in an outside security is not the less an investment because it is used for the advantage of the business. The motive of the company in making the investment does not assist the matter. The intention of the Legislature was to exclude sources of profit which are not earned in carrying on the business. It is no answer to the claim of the Crown to say that the investment is an asset of the business, for if it were not there could be no question of

(1) [1915] A. C. 433, 450.
(2) (1888) 2 Tax Cas. 367.
(3) [1891] 2 Q. B. 1.
(4) [1891] A. C. 531, 574.

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deduction. A deduction can only be made of something which otherwise would be included. It is a fallacy to say that the appellant company is continuing to carry on business in Belgium through the agency of the Belgian company because it is a shareholder of that company: *Gramophone and Typewriter, Ld.* v. *Stanley.* (1)

[They also referred to *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2); *English Crown Spelter Co.* v. *Baker* (3); *James Waldie & Sons* v. *Inland Revenue.* (4)]

Sir John Simon K.C. in reply referred to *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (5)

The House took time for consideration.

1923. May 11. VISCOUNT CAVE L.C. My Lords, this appeal from the Court of Appeal in England raises the question whether, in computing the capital of the appellant company for the purposes of excess profits duty, certain holdings of the appellants in foreign companies ought or ought not to be excluded.

The appellants, for some time before and down to the year 1908, carried on the business of refining and distributing petroleum, and had (among other branches) a distributing business in Belgium. In that year the appellant company, with two Belgian distributing firms who had been their competitors, agreed to sell their distributing businesses in Belgium to the Asiatic Petroleum Company upon the terms that the sole agency for the sale of the Asiatic Company's oil in that country should be entrusted to a new Belgian joint stock company in which the appellants and the two Belgian firms should each hold one-third of the shares. It was provided by the agreement that the vendors should, as from the formation of the new Belgian company, discontinue their business in Belgium, and should not during the continuance of the agency be interested in the sale of petroleum in that country. A Belgian company was accordingly formed

(1) [1908] 2 K. B. 89.
(2) [1911] 2 K. B. 577, 589.
(3) (1908) 5 Tax Cas. 327.
(4) (1919) 56 S. L. R. 602, 604.
(5) (1899) 4 Tax Cas. 41.

under the name of the Belgian Benzine Company (Société Anonyme) with a nominal capital of 510,000 francs divided into 510 shares of 1000 francs each, which were subscribed for and held as to one-third (or 170 shares) by the appellant company and as to the remaining two-thirds by the two Belgian firms equally. The amount originally paid up by the appellants on their shares in the Belgian company was one-tenth of their nominal amount (or 675*l.*); but, in December, 1910, on the term of existence of the Belgian company being prolonged under Belgian law for a further period, a further sum was paid up, making 1344*l.* in all. The Belgian company duly took over and carried on the agency for the Asiatic Petroleum Company, and paid large dividends upon its shares until the commencement of the war, but thenceforth ceased to pay any dividend.

In the year 1913 the appellant company entered into another and a different transaction. Having difficulty in obtaining supplies of petroleum, they sent a representative to Roumania, and, as a result of his mission, agreed to take shares and debentures in two Roumanian oil companies upon the terms that the appellants should have a call on the crude oil at the disposal of those companies at market prices. The amounts paid by the appellants for these shares and debentures in the year 1913 and the following years amounted to upwards of 27,000*l.*, but nothing was received by them in respect of dividends or interest on these shares and debentures.

In the year 1919 it became necessary to assess the appellant company to excess profits duty under the Finance (No. 2) Act, 1915; and the question then arose whether, for that purpose, the amounts paid by the appellants on the shares in the Belgian company and on the shares and debentures in the two Roumanian companies were or were not to be counted as part of the capital of the appellant company. The Commissioners of Inland Revenue took the view that these shares and debentures were "investments" within the meaning of r. 8 of Part I. of the Fourth Schedule to the Act, and accordingly were, under r. 2 of Part III. of the

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same Schedule, to be deducted in computing the amount of the appellant company's capital for the purposes of the Act. The appellants, whose interest it was that the statutory capital should not be so reduced, appealed on this question to the Commissioners for General Purposes of the Income Tax for the City of London; and the last-mentioned Commissioners, after hearing the parties, allowed the appeal, but, on the application of the Crown, stated a special case for the opinion of the King's Bench Division of the High Court of Justice. The finding of the Commissioners for General Purposes on the above question was expressed in the special case as follows: "The Commissioners held that the money employed in the foreign companies referred to was employed in the business of the Company as capital, and not as an investment within the meaning of the Finance (No. 2) Act, 1915, and they accordingly allowed the appeal." The case stated was argued before Sankey J., who treated the above finding of the Commissioners for General Purposes as a finding of pure fact, and, holding that there was some evidence upon which those Commissioners could come to their conclusion, dismissed the appeal from their decision. On appeal to the Court of Appeal, that Court (consisting of the Master of the Rolls and Scrutton and Younger L.JJ.) took a different view; and, holding that the question determined by the Commissioners for General Purposes was one of mixed fact and law and was accordingly open to review by the Court, they held unanimously that the holdings in question were "investments" within the meaning of r. 8, and accordingly should for the purposes of the Act be deducted from the company's capital. Hence the present appeal.

My Lords, I feel no doubt that the point is appealable. If the finding of the Commissioners for General Purposes were indeed one of pure fact, then it could not be reviewed except on the ground that there was no evidence upon which they could as reasonable men have come to their conclusion. But the finding involves not only a conclusion of fact, but the construction of the statute. It is a finding of mixed fact and law, and, as such, is open to review by the Courts.

The following are the material provisions of the Act: Sect. 40, sub-s. 1, provides that the profits arising from any trade or business to which the Act applies shall be determined on the same principles as they would be determined for the purpose of income tax, subject to the modifications set out in the first part of the Fourth Schedule to the Act. Sub-s. 2 of the same section enacts that the provisions contained in the third part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of excess profits duty. Rule 8 of Part I. of the Fourth Schedule declares that in estimating the profits no account shall be taken of income received from investments except in the case of life assurance businesses and businesses where the principal business consists of the making of investments. Rule 2 of Part III. of the same Schedule provides that any capital, the income on which is not taken into account for the purposes of Part I. of the Schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of Part III. of the Act. The effect of these provisions taken together is that in estimating profits for the purposes of the Act no account is to be taken of income received from investments except in the special cases referred to, and that in estimating capital for the same purpose investments are to be deducted and excluded. The reason for this exclusion may have been that, the intention being only to tax excess profits arising out of the actual carrying on of a trade or business, it was thought right to exclude from the calculation profits from investments, which might rise or fall for causes wholly unconnected with the trade, and (as a consequence) to exclude from the capital the investments themselves. But whatever the reason, the enactment is clear that " investments " are not to count as capital; and the question, therefore, is whether the holdings which are in question in this case are or are not " investments " within the meaning of r. 8 of Part I. of the Schedule.

That they are investments in the ordinary sense of the term probably no one would deny. They are money put out in the shares and securities of undertakings other than the

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undertaking of the appellant company itself, with the expectation of receiving dividends or interest upon them; and they satisfy any one of the definitions quoted by the Master of the Rolls from well-known dictionaries and any other definition of an investment which I am able to conceive. In all the balance sheets of the appellant company issued since these holdings were acquired, they were classified as investments; and although this circumstance is not conclusive to show that they are investments within the meaning of r. 8, it has some weight as showing that they are investments in the ordinary sense. But it is argued on behalf of the appellants that on the true construction of the Act a restricted meaning must be put upon the word "investments" as used in r. 8; that (to quote the language of the appellants' case) "the income excluded by that rule is income arising from capital employed otherwise than in the trading operations for which the business was constituted; that is to say, income from capital which is invested outside such operations with the object of obtaining a return thereon either by way of income or capital appreciation independently of the result of such trading operations"; and that the investments here in question do not fall within that definition.

My Lords, I find nothing in the Act which compels or admits of such a limitation of the meaning of the word "investments." The expression cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations, for which the business was constituted. Part III. of the Fourth Schedule deals, as the Master of the Rolls pointed out, entirely with the capital employed in the business, and provides (by r. 2) that if there is found in that capital some part, the income of which is not taken into account under

Part I., then that part is to be deducted. Investments fall within that category; and accordingly the direction is to deduct from capital any capital which takes the form of an investment. The point was put by Scrutton L.J. as follows (1): "When we turn to the definition of 'capital' we find that the amount of the capital of a trade or business —and it is that that we have to assess—is to be made up of certain items valued in a way specified in clauses 1 (*a*), 1 (*b*), 1 (*c*) and 3 of that Schedule. But we find an express provision that 'Any capital the income of which is not taken into account for the purposes of Part I. of this Schedule . . . . shall be deducted in computing the amount of capital for the purposes of Part III. of this Act.' It appears to me that the rule contemplates that the capital which it is talking about would, but for this provision, come into the capital of the trade or business, but is taken out by the express direction that if the profits on that capital do not come into the profits for the purpose of excess profits duty neither shall the capital from which the profits are derived come into the capital for the purpose of excess profits duty. The source and the fruit must both be included or both excluded, and if the fruit is excluded its source must also be excluded, although it may be otherwise capital of the trade or business." I respectfully agree with the reasoning of the majority of the Court of Appeal. The finding of the Commissioners for General Purposes, upon which the appellants rely, appears to assume that, if an investment is capital employed in the business, it cannot be an investment within the meaning of r. 8; and the judgment of Sankey J. seems to proceed on the same footing. In my opinion it may be both. Of course the term "investments" does not include all money embarked in the business itself, for that would be to reduce the rule to an absurdity; but I think that it includes money embarked in the business and with a view to the advantage of the business invested in an outside security. In my opinion, therefore, this argument fails.

Apart from the general contention with which I have been

(1) [1922] 2 K. B. 392.

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dealing, and which was put forward in connection both with the Belgian shares and with the Roumanian shares and debentures, counsel for the appellants put forward certain special arguments as to each of the two classes of holdings; and I will deal separately with these special points.

As to the Belgian shares, it was said that the transaction was not an investment at all, but was mere machinery for defining the interests of the appellant company and the two Belgian firms in the profits of the distributing business proposed to be carried on by the Belgian Benzine Company (Société Anonyme); that the last-mentioned company was nothing but a shell or shadow; and that in substance and in fact the appellant company continued after the transaction to carry on its distributing business in Belgium, and to receive the profits of that business. I cannot take that view. The documents show that there was a real sale to the Asiatic company of the appellant company's distributing business in Belgium, and that the appellant company wholly discontinued that business and agreed no longer to be interested in the distribution of petroleum in that country, except of course as a holder of shares in the Belgian company. It has been pointed out in many cases, of which *Gramophone and Typewriter, Ld.* v. *Stanley* (1) is an example, that the business and profits of a limited company are not the business or profits of the shareholders; and it would be an infringement of that principle to treat the appellant company as continuing to carry on its Belgian business through the agency of the Belgian company. The appellants ceased in 1908 to have any business in Belgium and became shareholders in the Belgian Benzine Company and nothing more. This view is confirmed, if confirmation is necessary, by a reference to r. 6 of Part I. of the Fourth Schedule to the Act of 1915, which provides that where any company owns the whole of the ordinary capital of any other company carrying on the same trade or business, the provisions of the Act as to excess profits duty shall apply as if that other company were a branch of the first-named company. If the appellants'

(1) [1908] 2 K. B. 89.

argument now under consideration were sound no such provision would be required.

As to the shares and debentures of the Roumanian companies a different point is made. It is said that the appellant company put money into those companies with no other motive except to obtain a supply of crude oil for its own trading operations; and accordingly that the money so applied was not money invested but money employed in the appellants' business. In my opinion the motive of an investment cannot be the determining factor on the question of its being an investment within the meaning of r. 8. A motor company may invest part of its capital in shares of a tyre company, or a tyre company may take shares in a rubber company, not with a view to the return in the shape of dividends (although that consideration would probably not be put entirely out of sight) but mainly with a view to obtaining a supply of tyres or of rubber, as the case may be; but the transaction in each case would none the less be an investment and r. 8 would apply. And so in the present case the fact (which I take as established) that the appellant company would not have embarked its funds in the shares and securities of the two Roumanian companies except for the purpose of obtaining supplies of oil, does not prevent that transaction from being an investment of those funds. In plain language, the appellants invested money in Roumanian shares and securities with a view to getting the control of oil for their trade; and that was for all purposes an investment, though made with a view to a collateral advantage.

For these reasons I am of opinion that the decision of the Court of Appeal was right both as to the Belgian and as to the Roumanian holdings, and that this appeal should be dismissed with costs.

VISCOUNT FINLAY. My Lords, this is a special case stated by the Commissioners of Taxes for the City of London on an appeal from an assessment made to the excess profits duty upon the Gas Lighting Improvement Company, the

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appellants in the present case, by the Commissioners of Inland Revenue for the accounting period from January 1 to December 31, 1917. The assessment stated the net amount of excess profits as 11,977*l.*, the rate at which assessed as 80 per cent., and the excess profits duty payable as 9581*l.* 12*s.* The Commissioners of Taxes for the city allowed the appeal, and their decision was confirmed by Sankey J. upon the case stated by them. The decision, however, was reversed by the Court of Appeal and the appeal of the Commissioners of Inland Revenue was allowed. Your Lordships are now asked to restore the decision arrived at by the City Commissioners and by Sankey J.

The business of the company as latterly conducted was the refining and distribution of petroleum spirit and other petroleum products. This appeal relates to two separate matters—namely, arrangements made by the company with another company named the Belgian Benzine Company, and arrangements made by the company with two Roumanian companies. It is convenient to take the case of the Roumanian companies first, as the facts there are simpler and bring out very clearly the question of principle at issue.

I.—For many years the company had obtained its supplies of petroleum spirit from the Asiatic Petroleum Company, but early in 1913 they failed to agree upon terms with that company and made arrangements with two Roumanian companies, the Beciu Company and the Stavropoleo Company, on the terms of two agreements made in June, 1913, with these two companies respectively. In pursuance of these agreements the company took up in 1913 25,000 1*l.* ordinary shares in the Beciu Company, paying in cash for such shares the sum of 7*s.* 6*d.* per share, and, further, 18,825 1*l.* ordinary shares in the Stavropoleo Company, paying therefor the sum of 1*l.* per share in cash, and also advancing to the Stavropoleo Company the sum of 2000*l.* upon the security of debentures issued by that company.

The case states as a fact that the company would have been unable to obtain from these Roumanian companies the supplies of oil required for the purposes of the company's trade unless

they had agreed to assist the finances of the Roumanian companies on these lines. During the year of assessment the company accordingly held in the two Roumanian companies shares and debentures to the amount of 27,831*l.* No dividends or interest were paid on these holdings in any of the years 1914, 1915, 1916 and 1917. The company contended that the capital employed to acquire these holdings should be included in computing for the purposes of the excess profits duty the amount of capital in the business of the company. The Commissioners and Sankey J. held that this was so, while the Court of Appeal took the contrary view and held that they should be excluded.

The question to be decided depends upon the construction to be put upon the Finance (No. 2) Act, 1915, and particularly r. 8 of Part I. and r. 2 of Part III. of the Fourth Schedule.

Part I. relates to the computation of profits for the purposes of excess profits duty, and r. 8 of that part provides as follows: "In estimating the profits no account shall be taken of income received from investments except in the case of life insurance business and businesses where the principal business consists of the making of investments."

Part III. relates to capital, and provides by r. 2 as follows: "Any capital the income on which is not taken into account for the purposes of Part I. of this schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of Part III. of this Act."

The ground of the decision of the City Commissioners is stated in the last paragraph but one of the special case, Appendix, pp. 10 and 11: "The Commissioners held that the money employed in the foreign companies referred to was employed in the business of the Company as capital and not as an investment within the meaning of the Finance (No. 2) Act, 1915, and they accordingly allowed the appeal." This is in reality a finding in point of law that investments made in the course of the business of a company are not investments within the meaning of r. 8. In other words, the Commissioners held that r. 8 applies only to investments made outside of the conduct of the company's business, such as investments of profits

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Viscount Finlay.

which have been realized in the business or have accrued to it aliunde.

I am unable to concur with this construction of r. 8. The rule must, on the face of it, have been intended to deal with cases in which but for its provisions the income of these investments would have formed part of the profits of the business. The rule is meaningless if it was intended to apply only to income which formed no part of the profits of the business, as such income would be already outside the scope of the excess profits duty. I do not see how it is possible to escape from the conclusion that r. 8 includes within its operation cases in which the money from which the income was derived was employed in the business of the company assessed to excess profits duty. If it does not, the rule has really nothing to operate upon.

It is, indeed, clear that in the present case the debentures and shares of the Roumanian companies were taken merely because this was made a condition of the supply of oil by the Roumanian companies. The investment was made purely for the purpose of carrying on the business by enabling the company to acquire the oil it wanted, but it remains none the less an investment. To qualify the rule in the sense suggested by the Gas Lighting Improvement Company is really to introduce into it words which are not there. There are no words to exempt from the operation of this r. 8 cases in which the investment has been made as here merely for the purposes of the business. It appears to me that it must have been intended by this rule to lay down a rule of general application subject only to the exceptions specified in the rule itself—namely, the case of life assurance business and businesses where the principal business consists in the making of investments. This is the broad rule which the Legislature has laid down. It may be that the principle on which the City Commissioners have acted would be more correct, but it can be reached only by treating the Act as amended. I cannot see how it can be adopted on the construction of the language of the clause.

It is, of course, for the advantage of the taxpayer that

certain classes of income should be excluded from the profits on which excess profits duty is to be paid, and he gets such an advantage under r. 8. It is also to the advantage of the taxpayer that the capital in the business should be increased, as this may diminish very greatly the amount on which the excess profits duty is to be charged. The higher the standard the less the excess liable to excess profits duty. But it would not be fair that the standard should be raised by including in its capital any sums the income on which is excluded from the computation of profits for the excess profits duty. It was no doubt for this reason that the Act adopts the exclusion under Part III. of any capital the income on which is not taken into account for the purpose of computation of profits liable to the excess profits duty under Part I.

I think that the finding of the City Commissioners as to the investments in the Roumanian companies cannot be supported in point of law. These are admittedly investments, and they do not fall within the exceptions specifically provided for in r. 8. There is no exception for investments made in the course of the business. The rule must have been intended to deal with such investments; indeed it is only in the case of such investments that the rule could have any operation.

II. The finding in the penultimate paragraph of the special case was arrived at with regard to the investments in the Belgian Benzine Company as well as those in the Roumanian companies.

The shares in the Belgian Benzine Company acquired by the Gas Light Company and held by them in the year of assessment are represented by a capital amount of 1344*l*. There is no doubt that these shares were acquired and held merely for the purpose of carrying on business in Belgium, and it is not necessary to go into the facts in detail; they are set out in the special case. In this case, as in the case of the Roumanian companies, with which I have already dealt, the City Commissioners found that the money was employed in the business of the company as capital and not as an investment within the meaning of r. 8. For the reasons I have given in dealing with the Roumanian investments the

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decision appears to me to be erroneous, and in my opinion the Court of Appeal were right in reversing in both instances.

I am therefore of opinion that this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Finlay. I have not only had that advantage but I have had the advantage of having discussed with him before he wrote the judgment the lines on which he intended to write it. I thoroughly concur with it and I have nothing to add.

LORD SUMNER. My Lords, the Commissioners of Taxes held "that the money employed in the Foreign Companies referred to was employed in the business of the Company as capital and not as an investment within the meaning of the Finance (No. 2) Act, 1915." This is a conclusion of law. The facts never were in dispute and they are fully set out in the case. I think the evidence is all one way and shows that the money employed in the foreign companies was not employed in the business of the company as capital or at all, but the really material part of the finding is that the money was not employed as an investment within the statutory words, and this is in any view a matter of law. The whole case is therefore open to consideration.

The question is whether the capital sunk (to use a neutral word) in the shares of the three foreign companies in question falls to be deducted in computing the amount of the appellants' capital for the purposes of Part III. of the Fourth Schedule to the Act, which depends in turn on this question, whether it is capital, the income on which, if any, is not taken into account for the purposes of Part I. of the Fourth Schedule, that is, whether it falls within the words "in estimating the profits no account shall be taken of income received from investments, except in the case of life assurance businesses and businesses where the principal business consists of the making of investments."

In the sense in which the word "investments" is commonly used among men of business I think there can be no doubt that the appellants' holdings of shares now under discussion were "investments"; indeed I note that the appellants themselves brought them into account in a series of annual balance sheets under this very term. I am not treating this as conclusive, or relying on it as an admission, but I think it is an illustration of the ordinary and proper use of the word. It is for the appellants now to show why these investments, though they are "investments," should not be treated as para. 8 of Part I. of Sch. IV. of 5 & 6 Geo. 5, c. 89, prescribes.

I understand the reason given to be that the money paid for the shares was really employed as part of the appellants' trading capital in their own business carried on in this country, or (possibly) in Belgium as regards their holding in the Belgian Benzine Company, and that, truly considered, the words above quoted only refer to investments extraneous to that active business, whose profits are chargeable with excess profits duty; that they only refer to inactive investments made for the purpose of utilising in a suitable manner funds not for the time being required in any chargeable business.

My Lords, it is plain that this reason might be expressed in the terms of an implied exception in para. 8, or of an implied qualification upon the word "investments," therein contained. In the first case there might be implied, after the word "investments," such words as "other than investments made for the purpose of furthering the business under charge": or before it in the second case the word "extraneous" or the word "non-trading." The appellants were not, however, desirous of resting their case on the implication of any words in the paragraph, and naturally so. It already contains express exceptions, in the cases of two named kinds of business, of investments, which are at least made for the purpose of furthering the business and even may be made as the principal business carried on, and any implication applicable to other cases is impossible. Equally

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impossible to my mind is the suggestion, that these two kinds of businesses are expressly referred to merely ex abundanti cautela, to quiet the apprehensions of those interested in them. Taxing Acts are not so considerate of the feelings of taxpayers. It is said that any form of property, into which a trading company puts its money while acting intra vires, is to it an investment of that money, and so, if the word "investments" is an unqualified word in computing the appropriate datum for excess profits duty, nothing would ever be "capital" except unexpended cash. I think it may equally be said on the other hand, that, in the case of such a company, no property is ever purchased except for the purpose of furthering its business, and therefore, everything it owns, as the result at any rate of purchases with its money, would to it always be a constituent part of its capital, as well as its unexpended cash. Both contentions really rest on the meaning of the word "investments," and I think the appellants were right in resting their argument on the mere construction of this word.

My Lords, it is quite plain on the facts that the money "employed in the foreign companies referred to," that is, employed by the appellants, was employed by them in buying shares in those companies and no further. After that, the money was employed by those companies, along with the rest of their subscribed capital, in their own business and not in the appellants' business. After the Belgian Benzine Company was organized the appellants carried on no business in Belgium. On the contrary they actually and under covenant abandoned that field in the Belgian Benzine Company's favour. In Roumania they never carried on any business at all, except, perhaps, that they bought from the Roumanian companies, in which they held shares, crude Roumanian oil, though where they contracted for it and where it became their property, we do not know.

It is said that all this was "machinery," but that is true of all participations in limited liability companies. They and their operations are simply the machinery, in an economic sense, by which natural persons, who desire to limit their

liability, participate in undertakings which they cannot manage to carry on themselves, either alone or in partnership, but, legally speaking, this machinery is not impersonal though it is inanimate. Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham (of which there is no suggestion here), the idea that it is mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts.

The truth is that these investments were made, as I suppose all good traders' investments are made, with a sound business motive. They may well have been forced on the appellants by circumstances which they could not otherwise deal with, and the prospect of dividends may have had little to do with the matter, but a noun substantive in a statute does not take its colour, like a chameleon, from such surroundings as the motives of the persons, whose property it correctly describes, and I think the whole question comes to this: "Does the context cut down the meaning of the word 'investments,' which *prima facie* it bears and which *prima facie* would include the holding of the shares in question?"

My Lords, it is true that the words "invest" and "investment" are often used loosely for the act of buying and for the thing bought, whatever it be, but we have nothing to do with that. I accept what the appellants urged, that not all "investments" proper are stocks and shares, though it does not follow that, in the case of a trading company, not all stocks and shares are investments. What, however, is the context, in which the word is used here? The Schedule prescribes rules for an operation closely akin to preparing a balance sheet of the assets and liabilities of a trading company. It does so for the purpose of ascertaining

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sometimes its trading capital, sometimes its trading profits or gains. The provisions as to charging excess profits duty are only concerned with profits, which are trading profits, and they are taxed with reference to a pre-war standard depending upon the one or the other. In such a connection why should an ordinary business term be used in any but its ordinary business sense? It is practically necessary that the sense should be definite, neither enlarged figuratively nor controlled by some notion about the scheme or the policy, if there was one, of this emergency tax. These words may in some cases operate to relieve the taxpayer and in some to enhance his charge. I think that in such a statute the plain meaning is the true one, and I am unable to see any ground here for adopting any construction, which is less than plain. My Lords, I should dismiss the appeal.

LORD PHILLIMORE. My Lords, I agree with the Court of Appeal and with your Lordships that this is not a case in which we are concluded by the finding of the Commissioners. The matter involves a question of construction of the statute and is therefore one of mixed law and fact.

I agree also that the expression "income received from investments" and the word "investments" taken by themselves, need receive no restriction other than those necessarily imposed by the consideration of the rest of the statute. Those restrictions are (as I can see them) three. You must not include as an investment the capital put into the business itself, because that is the very matter on which excess profits are to be considered; nor money already in the business and merely shifted from one limb or branch of the business to another; nor new capital put into the business, because that is provided for by s. 41.

All else is an investment to be treated as separate from the business, and the income from it is not to be taken into calculation in arriving at profits.

So far, I see my way clear; but when the question comes to be considered, as in this case, of an incorporated company shifting some part of its assets into some cognate business

for the purpose of furthering its original business, a decision that this is an investment within the meaning of Part I., r. 8, and Part III., r. 2, of the Fourth Schedule, and therefore removed from the calculation of profits, and not a mere shifting from one branch or limb of the business to another, seems to me an almost arbitrary one. Considerations could be urged on either side; and I have difficulty in finding any guiding principle of law or business; though I see more force in the contention for the Crown as to the Belgian matter than in the contention as to the Roumanian matter.

Upon the whole, however, I do not dissent, even in the Roumanian matter, from the conclusions at which the Court of Appeal have arrived and of which your Lordships have now expressed your approval, and I agree that this appeal should be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 11, 1923.

Solicitors for the appellants: *Deacon & Co.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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BRADBURY . . . . . APPELLANT;

AND

ENGLISH SEWING COTTON COMPANY, LIMITED . . . . . } RESPONDENTS.

Revenue—Income Tax—English Company holding Shares in American Company managed in United Kingdom—American Dividends taxed by Deduction—Transfer of Management to America—Claim by Revenue Authorities to treat American Dividends throughout as Profits from "foreign possessions"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, Cases I. and V.—Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch.* 1 *D, Cases I. and V.*

An English company held practically all the common stock in an American company which it had formed. In 1915, 1916 and 1917 the American company was managed and controlled from England, so that it was taxable, and taxed as resident in this country, upon its whole profits under Case I. of Sch. D. The English company bore its share of taxation by deduction by the American company from its dividends of a proportionate part of the tax. In 1917 the management and control of the American company was transferred to America. The revenue authorities then assessed the English company, under Case V. of Sch. D, upon the amount of the American dividends as profits received from a "foreign possession," and claimed to treat the amount of dividends received from the American company in the years 1915–1917 as being also profits received from a "foreign possession" in order to ascertain the three years' average on which the assessment for the subsequent years under Case V. was to be founded:—

Held (by Viscount Cave L.C., Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Phillimore; Lord Sumner dissenting), that for the purposes of the Income Tax Acts the locality of the shares or stock of a company was to be determined not by its place of incorporation or registration, but by its place of residence and trading, and that consequently the dividends received by the English company on the stock in the American company during the years 1915–1917 ought not to be brought into average in computing the liability of the English company to income tax in respect of foreign possessions under Sch. D, Case V., for the years 1918–1920.

Decision of the Court of Appeal [1922] 2 K. B. 569 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Sankey J. upon a case stated by the Commissioners

* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD WRENBURY, and LORD PHILLIMORE.

(1) [1922] 2 K. B. 569.

for the Special Purposes of the Income Tax Acts under s. 59 of the Taxes Management Act, 1880, and s. 149 of the Income Tax Act, 1918.

The case is fully set out in the report before the Court of Appeal and the facts sufficiently appear from the judgment of the Lord Chancellor.

The question raised by the appeal was whether the dividends received by the respondents, the English Sewing Cotton Company, upon their holding of common stock in the American Thread Company during the years ending on April 5, 1915, 1916 and 1917, could in the circumstances of the case (which are summarized in the headnote) be taken into account in computing the liability of the English company to income tax in respect of foreign possessions under Sch. D, Case V., of the Income Tax Acts for the years ending on April 5 in 1918, 1919 and 1920.

The Commissioners decided this question in the negative, and their determination was affirmed by Sankey J.

The Court of Appeal, by a majority (Lord Sterndale M.R. and Younger L.J.; Scrutton L.J. dissenting), affirmed the decision of Sankey J.

1923. March 20, 22, 23. *Sir Leslie Scott K.C.* and *Reginald Hills* (*Sir Douglas Hogg A.-G.* with them) for the appellant. For all the purposes of the Fifth Case of Sch. D, including the computation of profits on the three years' average, the shares of a foreign company incorporated in a foreign state under the laws of that state are foreign possessions of a shareholder resident in this country and the dividends on such shares are profits from foreign possessions. A company is presumed to reside in its place of incorporation, although it may for some purposes have more than one residence. It is true that the American Thread Company, owing to the control of the trade of the company being exercised by a board of directors in England, must be deemed, in accordance with the decision in *American Thread Co.* v. *Joyce* (1),

(1) (1911–1913) 6 Tax Cas. 1, 163.

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to have acquired during the three years preceding the first of the assessments under appeal (being assessments made on the respondents after the change in the place of control of the American company), for the purpose of the taxation of the profits of its trade, a residence in the United Kingdom, and had become chargeable to income tax on the whole of its profits under the First Case of Sch. D, but this fact does not affect the relations between the American Thread Company and its stockholders and does not prevent the stock of that company from being foreign possessions of stockholders resident in the United Kingdom. The American company made deductions on account of income tax from the dividends paid during those years to the respondent company, and no assessments were made during those years upon the respondent company in respect of those dividends under the Fifth Case of Sch. D, but the fact that no such assessments were made merely implied that the claim for the duty chargeable in respect thereof had been satisfied because the dividends had been paid out of a taxed fund, and any further assessment would have been contrary to the rule against double taxation, and it did not affect the character of the stock as being foreign possessions or the character of the dividends as being profits from such possessions.

[They referred to: *Brown* v. *National Provident Institution* (1); *Gramophone and Typewriter, Ld.* v. *Stanley* (2); *Inland Revenue Commissioners* v. *Blott* (3); *Colquhoun* v. *Brooks* (4); *Mitchell* v. *Egyptian Hotels, Ld.* (5); *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (6)

The Lord Chancellor referred to *Attorney-General* v. *Higgins* (7) and *In the Goods of Ewing.* (8)]

The appellant's method of computation of the profits is in accordance with the principles laid down in *Gilbertson* v. *Fergusson* (9) and *Singer* v. *Williams.* (10)

(1) [1921] 2 A. C. 222, 236, 243.
(2) [1908] 2 K. B. 89, 95, 105.
(3) [1921] 2 A. C. 171.
(4) (1889) 14 App. Cas. 493.
(5) [1915] A. C. 1022.
(6) [1896] A. C. 31, 40.
(7) (1857) 2 H. & N. 339.
(8) (1881) 6 P. D. 19, 23.
(9) (1881) 7 Q. B. D. 562.
(10) [1919] 2 K. B. 94, 100; [1921] 1 A. C. 41.

Sir John Simon K.C. and *Latter K.C.* (with them *Cyril L. King*) for the respondents. Although the place of registration may have a finger-post value for the purpose of determining where a company is located it does not conclude the question. For the purposes of income tax law a company resides where the central management and control actually abides: *Cesena Sulphur Co.* v. *Nicholson* (1); *De Beers Consolidated Mines* v. *Howe* (2); *Ogilvie* v. *Kitton* (3); *American Thread Co.* v. *Joyce.* (4) In this case there is impliedly a finding of fact by the Commissioners that in 1914–16 the American Thread Company was resident in this country. Dividends received from a company resident and carrying on business in the United Kingdom are not income from foreign possessions within Case V. of Sch. D. On the facts existing up to April 5, 1917, the Crown was bound to, and did, assess the American company under Case I. of Sch. D in respect of all its profits and cannot now tax those profits or the respondents' share of them under Case V. of Sch. D. The result of the assessments made on the American company for the years prior to the change in the control of the management is that for the purposes of the Income Tax Acts the dividends for those years were profits from a British source and not income from foreign possessions. Income arising from a source which is regarded for income tax purposes as British so as to expose the whole income to tax cannot at the same time be regarded for those purposes as income from a foreign possession.

[They also referred to: *Purdie* v. *The King* (5); *London County Council* v. *Attorney-General* (6); *Attorney-General* v. *London County Council* (7); *Williams* v. *Singer.* (8)]

Sir Leslie Scott K.C. replied.

The House took time for consideration.

(1) (1876) 1 Ex. D, 428. 453.
(2) [1906] A. C. 455, 458, 460.
(3) (1908) 5 Tax Cas. 338, 344.
(4) 6 Tax Cas. 1, 27, 30, 31–2, 163, 164.
(5) [1914] 3 K. B. 112, 116.
(6) [1901] A. C. 26, 35, 38.
(7) [1907] A. C. 131, 135.
(8) [1921] 1 A. C. 65, 75.

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1923. June 21. VISCOUNT CAVE L.C. (read by LORD SHAW OF DUNFERMLINE). My Lords, this appeal from the Court of Appeal in England raises the question whether certain dividends received by the respondent company (the English Sewing Cotton Company, Ld.) on stock in an American company called the American Thread Company in the tax years 1914–15, 1915–16 and 1916–17, can be brought into average in computing the liability of the respondent company to be taxed on their income from foreign possessions in respect of the succeeding tax years 1917–18, 1918–19 and 1919–20.

The respondent company, a company registered and carrying on business in the United Kingdom, was during the above-mentioned years the holder (by itself or its nominees) of the whole of the common stock of the American Thread Company. That company was incorporated and registered in New Jersey, and its purchases and sales of cotton and thread were made in the United States or elsewhere abroad. But in the year 1903 the by-laws of the American company were altered so as to provide that, while the current business of the company was to be carried on by an executive committee of directors sitting in New York, the decisions of the board of directors on questions such as the purchase or leasing of any business or plant, the sale or lease of the company's real estate, the borrowing of money, the selection of the executive committee, the making of agreements which were to bind the company for more than a year, and the appointment of the principal officers, were to be dealt with exclusively by extraordinary meetings of the board to be held in Great Britain. This change was doubtless made at the instance of the respondent company, as the holder of the common stock of the American company, in order that all important questions of policy might be settled in England, where four of the seven directors of the American company (who were also directors of the respondent company) resided, and under the eye of the respondent company; and this in fact happened, the extraordinary meetings of the board being held by permission of the respondent company at the respondent company's offices in

Manchester, and being regularly attended by an assistant secretary, who also resided in the United Kingdom.

Under these conditions the Commissioners of Inland Revenue assessed the American company to income tax under Case I. of Sch. D of the Income Tax Acts in respect of the tax years 1914–15, 1915–16 and 1916–17 (which I will call the first three years), on the whole of the annual profits and gains arising from its trade wherever carried on, the assessment being made on the ground that, having regard to the facts above recited, the American company had become for all income tax purposes a person resident in the United Kingdom. The American company appealed against this assessment to the Commissioners for the General Purposes of the Income Tax Acts for the Division of Manchester; but those Commissioners, after hearing the parties, dismissed the appeal and, at the request of the American company, stated a case for the opinion of the High Court. The material findings of the last-mentioned Commissioners were stated in the case as follows: "The Commissioners have heard counsel on behalf of the Appellant Company and the Inspector of Taxes for the Inland Revenue, and having taken into consideration the documents and the evidence of witnesses adduced before them, came to the conclusion that the control of the management of the affairs of the Appellant Company was intended to rest and did rest with the directors of the Appellant Company resident in England in extraordinary session, who constituted a majority of the Board and who are also directors of the English Sewing Cotton Company, Limited, which owns the entire common stock or ordinary shares of the Appellant Company, and further that such control was constantly exercised at meetings of the Board of the Appellant Company in extraordinary session held in England. The Commissioners determined that the Appellant Company is a person residing in the United Kingdom and is liable as such to be assessed under Section 2 of the Income Tax Act, 1853, Schedule D, paragraph 1, sub-section 1, on the whole of the annual profits and gains arising or accruing from its trade whether the same was carried on in the United Kingdom or elsewhere and

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accordingly confirmed the assessment." The arguments on the case so stated were heard by Hamilton J., who held that there was evidence on which the Commissioners could come to the above conclusion, and accordingly affirmed their decision; and appeals against this judgment, first to the Court of Appeal and then to the House of Lords, were dismissed: *American Thread Co.* v. *Joyce.* (1)

During the period of the three years above mentioned the dividends on the common stock of the American company, though apparently settled by the directors in England, were declared in the United States and were remitted by cheque from the United States to the respondent company, the income tax levied on the American company in England being deducted.

After, and probably by reason of, this decision, the American company again altered its by-laws so as to put an end to its "residence" in the United Kingdom, and to transfer the whole control and management of its business to the United States. This transfer was completed shortly before April 5, 1917; and, accordingly, as from the end of the tax year 1916–17, the Crown was no longer in a position to assess the American company to income tax, and could only assess the respondent company under Case V. of Sch. D in respect of its dividends on the common stock in the American company, as being income from foreign possessions. In making this assessment for each of the tax years 1917–18, 1918–19 and 1919–20 (which I will call the second three years), the Commissioners of Inland Revenue claimed to bring into computation for the three years' average to be struck under Case V. (in addition to the income of certain other foreign possessions, which need not be further mentioned) the dividends received by the respondent company on the common stock of the American company during the first three years. In other words, they claimed that in assessing the respondents to tax on their receipts from foreign possessions for the tax year 1917–18, they were entitled to take into account the dividends received in England during the first three years, plus the tax deducted from those

(1) 6 Tax Cas. 1, 163.

dividends, and to strike an average accordingly; and so as to each of the two following tax years. This claim was resisted by the respondents, who contended that the American company having during the first three years been resident in England, the dividends on its stock were not income from foreign possessions at all, and accordingly could not be brought into the computation for the purpose of the three years' average. It is this dispute which falls to be decided upon the present appeal; and its importance to the parties may be gathered from the fact that the dividends so received amounted in the year 1914–15 to 111,600*l.*, in the year 1915–16 to 200,880*l.*, and in the year 1916–17 to 185,925*l.* (gross before deduction of tax).

The dispute having been referred to the Commissioners for the Special Purposes of the Income Tax, those Commissioners, after hearing the parties, gave their decision in favour of the respondents, and reduced the assessments accordingly, but, on the application of the Crown, stated a case for the opinion of the High Court. In this case the Commissioners referred to and in effect adopted the findings in the case of the *American Thread Co.* v. *Joyce* (1) (to which I have accordingly freely referred in the above statement) and stated their conclusions as follows: "We are of opinion that dividends on shares in a company which, though incorporated in a foreign country, is resident and carries on business in the United Kingdom, and is assessed on the whole of its profits under Case I. of Schedule D, are not income from a foreign possession within Case V., and that the dividends declared by the American Thread Company and received by the English Sewing Cotton Company, Limited, subject to deduction of tax, in the years 1914–15, 1915–16 and 1916–17, when the American Thread Company was controlled in the United Kingdom, cannot for the purposes of Case V. assessments on the English Sewing Cotton Company, Limited, for subsequent years be added to the income from foreign possessions originally brought into the average for assessment under Case V. We shall accordingly reduce the Case V. assessments to the average of

(1) 6 Tax Cas. 1, 163.

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the income from foreign possessions exclusive of the dividends of the American Thread Company prior to 5th April 1917, but inclusive of the dividends of that Company payable after that date." Upon the argument of the case stated before Sankey J., that learned judge held that the question was a question of fact for the Commissioners, and that there was ample evidence upon which they could have come to their conclusions, and held also that they had not erred in law; and he accordingly dismissed the appeal of the Commissioners of Inland Revenue. On an appeal by the Crown to the Court of Appeal, that Court, by a majority (consisting of the Master of the Rolls and Younger L.J.; Scrutton L.J. dissenting), affirmed the decision of Sankey J. Hence the present appeal.

My Lords, I think it important to point out that there is here no question of a claim to double taxation. The respondents' dividends for the first three years have already paid tax by deduction, and could not now be taxed again; nor does the appellant allege that they could. His claim is, not to tax those dividends over again, but to tax the respondents' income from foreign possessions for the second three years, and for that purpose, and for that purpose only, to take account of the dividends received in the first three years, and to compute the tax for the later years upon the average so obtained. As was pointed out in *Singer* v. *Williams* (1) the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation. If the dividends for the first three years were in truth income from foreign possessions, the Crown is entitled (I think) to bring them into the computation; and as the case presents itself to me, the real question to be determined is whether they were in fact such income.

Then, were the dividends received in the first three years income from foreign possessions, or (in other words) was the common stock during the first three years a foreign possession

(1) [1921] 1 A. C. 41.

of the respondents? This appears to me to be a question of some difficulty. On the one hand, the stock was stock in a company incorporated according to the law of New Jersey, and having its registered office there, and so American by birth and status. But, on the other hand, it was decided in *Joyce's Case* (1) and must be taken to be the fact that this American company was, during the three years in question, resident in England, where (to use the language of Lord Loreburn in *De Beers Consolidated Mines* v. *Howe* (2)) the seat and directing power of the affairs of the company were located, and its chief operations both in the United Kingdom and elsewhere were controlled, managed, and directed. And the question, therefore, arises, whether the locality of the shares or stock of a company is to be determined by its place of incorporation and registration or by its place of residence and trading. After some doubt, I have come to the conclusion that the latter is the true view. "Shares in a company," said Sir James Hannen in *In the Goods of Ewing* (3), "are locally situate where the head office is"; and I think this means that they are locally situate where the company's principal place of business is to be found. A share or a parcel of stock is an incorporeal thing, carrying the right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid upon it. It was decided in *Joyce's Case* (1) that during the first three years the American company was here for all the purposes of income tax; and the company being here, I find it impossible to hold that its stock was abroad. In any case I am unable to understand how the Crown, having in 1913 successfully maintained that the American company was then resident and trading in England, can now be heard to say that the profits of that trading when divided among the stockholders were income from foreign possessions. The fact that the dividends were declared in America and remitted by American cheque cannot, in my opinion, displace the inference to be drawn from the

(1) 6 Tax Cas. 1, 163. (2) [1906] A. C. 455, 458.
(3) 6 P. D. 19, 23.

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fact that the company resided and traded in England. The result may be unfortunate for the Crown, which will lose duty on some part of the later dividends; but the Crown succeeded in 1913 in establishing that for income tax purposes the American company was here, and must accept the consequences of its victory.

If this be the right view, then there is an end of this appeal, and it is unnecessary to deal with the further difficulty to which Younger L.J. referred—namely, that the dividends received by the appellants in the first three years did not represent the full divisible income of the American company, but only that income diminished by the tax levied upon it. It is enough to say that on the contention which is at the root of the appellant's case—namely, that the dividends received in the first three years were income received from foreign possessions—the appellant fails, and accordingly that, in my opinion, this appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the position of the American Thread Company in reference to income tax in the United Kingdom was settled in the case of *American Thread Co.* v. *Joyce.* (1) With reference to the taxing years 1914–1915, 1915–1916 and 1916–1917 that decision, of course, clearly applies. It was to the effect that this House confirmed the finding in fact that the control and management of the affairs of the company resided with and was exercised by directors resident in England; the American Thread Company accordingly must, for the purposes of income tax, be regarded as resident and carrying on business in the United Kingdom, and as consequently liable to assessment on the profits of its trade under Case I. of Sch. D.

The first and very simple proposition which I make on this judgment is that, reaffirming various decisions, it settles, in the case of this thread company, and settles in the negative, the proposition that a company necessarily resides where it is registered. And the second proposition is that residence is the true test for the purpose of enabling the officers of

(1) 6 Tax Cas. 1, 163.

revenue to determine under which category or rule in Sch. D the assessment of income tax is to be laid on.

In *De Beers Consolidated Mines* v. *Howe* (1) the proposition was put forward that a company resides where it is registered and nowhere else. The House of Lords declined to adopt any such view. Lord Loreburn L.C. observed that it was "maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa. I cannot adopt Mr. Cohen's contention. In applying the construction of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual." His observations go on to distinguish—as my noble and learned friend Lord Wrenbury in a judgment which I have had the advantage of perusing, and which is now about to be read, also distinguishes—between nationality and residence.

Residence is the test, and as applied to a company, all those considerations affecting control, management, etc., of its affairs which supply the equivalent of residence, and that test has been definitely applied in this country to the American Thread Company. In my opinion accordingly it is settled beyond recall that during the years to which I have referred the profits of the company were profits assessable as profits on a trading company residing in England.

I hold, my Lords, that by its nature this involves a direct negative to the proposition that for the purpose of taxation for revenue in this country under the Income Tax Acts the company or the shares therein can be treated as foreign possessions.

In my humble opinion the rules under Sch. D of the Income Tax Act were rules made to apply so as to disintegrate into categories the cases of liability to taxation in the Schedule. The separate cases mean the separate instances to which, in fact, this Schedule with its taxation will apply. According to the view which I have formed it is accordingly impossible to permit overlapping in these cases, because overlapping is the very opposite of that disintegration which was the object of

(1) [1906] A. C. 455, 458.

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the division into cases. Accordingly when the profits from a trading concern are taxed on the footing that it is an English trading concern then, ex necessitate, this involves that the taxing authority is committed to that situation and is, for all purposes of the Income Tax Acts, precluded from placing or reckoning the income so treated under any other category. That fact, accepted or decided, concerning the profits or profit of what is settled to be an English trading company is a negation of the conception that they can for the same years, and in respect of the same profits, be reckoned as a foreign possession.

These things seem so clear that it would be unnecessary to refer to them but for the statement in the case that it was contended on behalf of the Crown "that the dividends received by the respondents from the American Thread Company upon their holding of common stock in that company were at all material times, both before and after the transfer of the control of the American Thread Company to America, income from a foreign possession." In my opinion, for the reason I have given, this contention is altogether unsound.

When the taxing year April 1917–1918 was reached, the American Thread Company, which as an English company under the decision referred to had, during the three preceding years, paid its dividends to the respondents, became an American company by the shifting of the locus of its management and control. In doing so it placed the income tax authorities in the position that it could no longer be looked upon as an English company. A change had occurred; its English residence was lost, and it was therefore a foreign possession out of which the respondent company drew its dividends. The case accordingly was simply one in which the facts were subsumed under Case V., the foreign possession case, instead of under Case I., the English trading case. Up to that date the American company had been English, after that it was foreign; and the contention of the Crown is that in the reckoning of income from foreign possessions, the taxpayer is bound to bring into calculation for the purpose of a three years' average applicable

to foreign possessions those very years with regard to which it has been judicially determined that the American Thread Company was not a foreign possession.

My Lords, there are several answers to this, one of which is obvious enough, to the effect that the actual taxpayer in the three years 1914–1917 was the American Thread Company, on account of its residence. That taxpayer was enabled under the statute to be recouped by deducting from the dividends paid to the English Sewing Cotton Company the proportionate amounts appertaining to their dividends. But after the transfer to America, the American Thread Company drops out; the actual taxpayer thenceforward is the English Sewing Cotton Company, and the English Sewing Cotton Company was not a taxpayer in those previous years. Consequently the identity of the respondents who are to pay on their foreign possessions subsequent to 1917 is not an identity with any taxpayer who paid on foreign possessions prior to that date. For the English Sewing Cotton Company to include in their foreign possessions the shares in the American Thread Company which they owned in the three years for which the American company, as English taxpayers, have already been taxed—and to make a return which would state that during the three years 1914–1917 it, the English Sewing Cotton Company, had been obtaining income from the American Thread Company, as a foreign possession—this, in view of the decision in *Joyce's Case* (1), would have been to make a false return. The duties and obligations in regard to the three years of average which I have cited had been completely discharged by recouping the American Thread Company, as an English trading company, the tax imposed upon the profits of that concern. When that was done, and the change of residence occurred, the correct category under Sch. D had been reached, and, as I have indicated, when that has been done it appears to me to exclude all other categories.

If it did not so exclude all other categories, it would, I fear, follow that it would be logically possible, even during the three

(1) 6 Tax Cas. 1, 163.

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years while a taxpayer was paying under one category, to compel him also to pay taxation under another category, and that is clearly contrary to law. It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have been already defined and taxed under one category as to be taken into account for the purpose of averaging under another category. I see no justification for opening the past which has definitely fixed the case and its nature under which the profits have been classed, or to do so either for the purpose of doubling taxation completely, or doubling taxation partially, or doubling taxation ad interim.

I am of opinion that the Courts below have reached the correct conclusion.

LORD SUMNER. My Lords, it seems not to be disputed that, after the control of the American Thread Company's business was removed from the United Kingdom, dividends on its common stock distributed to the respondents, when assessable, fall under the Fifth Case of Sch. D. The admission involves the further result that the stock held by them is part of their foreign possessions. Apart, however, from admissions, I think this must be so. The American Thread Company has now nothing English about it except the fact that practically all its stock is owned in England, which is not in itself of great significance in such a connection as this. Its property, its operations and its management are all in the United States. What else can its common stock now be to English holders except foreign possessions, unless indeed the place where the share certificates are kept is to be of moment? The quality of being foreign in respect of a "possession" must be relative to the taxpayer who possesses, and to the time, at which he is assessed. It is not requisite to say that the company is now necessarily or actually situated in New Jersey, where it is incorporated. Within the United States its local situation may be a question of degree and doubly, therefore, a question of fact. Its situation may change from time to time, but at any rate the situation of an English

holding of its stock is, for present purposes, abroad. Further the words of the Schedule and Cases themselves invest shares with the capacity of being "foreign," that is of having locality, and that locality cannot simply be the locality of the shareholder, since he always is, ex hypothesi, resident in the United Kingdom and so is being assessed here. I think that prima facie the locality of the shares must be the locality of the company, whose share capital is constituted by the shares into which it is divided, and that locality is abroad.

As to the duty to be charged the statute is imperative. The duty has to be charged, at the appropriate rate of tax, upon a sum, and that sum has to be computed for the purpose of being charged. The Act says that the sum shall be "not less than the full amount of the actual sums annually received in Great Britain." That will be the result of the computation. As to the method of it, the Act proceeds "computing the same on an average of the three preceding years, as directed in the First Case," that is to say "upon a fair and just average of three years," ending on a day in the year immediately preceding the year of assessment, which is fixed by the customary date for making up the accounts of the trade, the profits of which are being charged. The reference from Case V. to Case I. seems to show that Case V. was originally framed, so far as trading foreign possessions are concerned, mainly with reference to trades carried on abroad by the taxpayer who is charged at home, and not to a case like the present, where the taxpayer is not the trader but only the holder of stock in a foreign incorporated company, trading abroad. Accordingly, the two provisos in Case I. seem to be wholly inapplicable to Case V. under such circumstances, and the date on which the period of three years is to end becomes an arbitrary one, unless the trade and the profits of the American Thread Company are regarded as the respondents' trade and profits, which in law they are not. This much, however, is clear that, when the respondents are charged under Case V., they are charged on a sum which, on the one hand, must be deemed to be the sum actually received in Great Britain in the year of charge, since the words

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of the case direct the duty to be computed on a sum not less than the sum so actually received, and, on the other, will only be the same as that actually received in the year of charge notionally or by accident, for it is the result of computation from sums arising or received in other years. The basis of the computation appears to be that something is to be measured not by actually measuring it but by measuring something else, more or less like it; in other words, the sums arising or received in previous years are only factors in a computation, while the sum taxed, as the result of that computation, is a sum which was not taxed in previous years, since it did not then exist.

As the respondents in the year of charge (by which I mean in the first year of charge after the change in the place of management of the American Thread Company) did actually receive in Great Britain, by remittances from abroad, sums in respect of a foreign possession—namely, their holding of the common stock of the American Thread Company—and as those sums could be reached by the Inland Revenue in no other way than by the application of Case V., it seems to follow that the amount was rightly computed by striking an average of the dividends for the three preceding years, distributed by the American Thread Company in respect of the same foreign possessions, remitted from the same quarter, and resulting from the same distribution to its stockholders.

My Lords, I accept it as a principle now well recognized, that the various taxing Acts with which we are concerned nowhere authorize the Crown to take income tax twice over in respect of the same source for the same period of time, and that this can only be done, if at all, under statutory authority. Though the Acts nowhere say so, this principle has long been assumed. Whether the contention may ever be raised, that the Crown is not bound by mere conventions of fair play current from time to time, hitherto, at any rate, the binding force of this principle has not been questioned.

The respondents' argument, as I apprehend it, is rested primarily upon this ground. It is said that, if duty in respect

of the dividends for the year of charge is charged upon the respondents on a computation of the average of their dividends in the three preceding years, the Crown will be taxing the same thing—namely, the dividends in those three years—twice over, for they were only paid to the respondents out of profits, which had already been taxed in the hands of the American Thread Company, and the respondents in turn suffered a proportionate deduction in respect of that tax. Thus the dividends will be taxed over again, if they are brought into computation to ascertain the amount of duty to be paid in the year of charge. The argument, that the Crown, having chosen to tax the profits of the American Thread Company for the three previous years, is bound by its election and must act consistently throughout, is, I think, only an additional mode of stating the same point. The case is one neither of option nor of estoppel in the true sense of the words. The Crown does not make an arbitrary election between taxing A. and taxing B. It follows the Act, and, having done so, is not estopped thereby from doing something else, which it is authorized to do. If it follows the Act again in another case when it arises, it acts within the law.

The respondents, however, urge as the only way of introducing consistency into the whole proceedings, that the dividends which they received in the three previous years were not really sums received in respect of foreign possessions, but were sums distributed to its stockholders by a company which was, "for income tax purposes," an English company and was assessed accordingly. From this they say that it follows that, even if the dividends received in the three previous years are introduced for purposes of computation only and are not sought to be made the subject of charge in any true sense during the year of charge, still, as a "fair and just" average, or any average at all, of the three preceding years involves an average only of things which are comparable, as being identical in character, no average can be struck of dividends received in respect of a foreign possession and of dividends received from what, at any rate "for income tax purposes," was an English trading company. Such is

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the argument. The question must be whether a company, which is in fact foreign and whose stock is prima facie foreign, becomes the contrary either by reason of the language of the Income Tax Acts or by reason of the course taken on behalf of the Crown in administering them.

In substance, my Lords, the Income Tax Acts are confined to what is their proper business—namely, the provision of authority, under which specified taxation is to be raised from specified classes of taxpayers upon specified subjects of charge. For the rest, the Acts take the general law as they find it. An American company for general purposes is an American company for income tax purposes, but there are circumstances under which an American company can be assessed to income tax here. In its appeal to your Lordships' House the American Thread Company was not held to be an English company "for income tax purposes." What was held was that, if it resided in England and thence directed and controlled a business here and abroad, the Income Tax Acts made it liable to be assessed for income tax here on the whole of its profits, wherever made. If being assessed to British income tax makes an income a British income, then the American Thread Company earned a British income, but it was a foreign company all the same, and, as its common stock did not belong to it but to the stockholders, there was no sense in which that stock was anything but a foreign possession to those British stockholders, to whom it belonged. An attempt was made at the Bar to explain a foreign possession as being that kind of source of income which, being abroad, was beyond the reach of the English tax-gatherer's arm, so that he had to levy on the recipient of its fruits in England, but I think this contention fails for the simple reason that the words are foreign possessions not foreign sources. It seems to me to follow that the respondents' shares in the American Thread Company have been foreign possessions all along, and are so still, and that an average of the dividends actually received from them is a fair and just one, since they are all comparable and of the same character; that the reason why,

in the earlier years, the respondents were not chargeable in respect of them simply was, that they were annual payments arising out of the property of another person, for which such other person ought to be, and was, charged by virtue of the Act of 1842, and not because the shares were not foreign possessions of the respondents, or because the other person, the American Thread Company, was for income tax or any other purposes, an English company. The Master of the Rolls says, in the course of his judgment: "I agree that the American Company is not transformed into an English Company by the fact that circumstances have made it taxable in England, nor are its shares changed from a foreign possession into an English possession by such taxation." So far I concur. Where I venture to differ from him is in thinking that the Crown really is "justified in making use of them as foreign possessions" now, because such action is not inconsistent in itself nor contrary to the language of the legislation. The question for us is not whether what has been done is extortionate but whether it is illegal.

Furthermore, I think there is here no question of taxing the same thing twice over. What was taxed in the three preceding years was the profit made by the American Thread Company. That did not belong to the respondents nor was tax paid upon it by or for the respondents. It belonged to the American Thread Company, who paid tax on it for themselves. Apart from any peculiar provisions in their articles of association, the American Thread Company might or might not have paid dividends in those years, as they chose; they might or might not have paid their dividends out of reserves, and not merely out of the profits of the year; they might or might not have deducted tax against their stockholders on the dividends paid. In fact, again subject to any special provisions in their articles, the respondents, by exercising their voting power in time, could have prevented any deduction being made at all, and if they themselves suffered tax by deduction, it was because they did not choose to prevent it. The Acts have regard to the economic identity of annual payments arising out of profits, which are a taxable source,

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to the extent of taxing the payor without requiring the payee to include them in his return, but this is under the express provisions of the legislation. Beyond that, effect must be given to the legal position—namely, that in the three preceding years the respondents' dividends were not taxed. The words of Case V. must be read accordingly, and the result is that there has not been in this case any taxing a second time. A similar answer applies to the argument that, for the three preceding years, what the Crown seeks to bring into the computation is the gross dividend, though all that the respondents actually received was the residue after deduction of the proportionate amount of tax. The object of the computation is to arrive at a notional sum, which will be taken to be the full amount of the actual sum on which tax is to be levied for the year of charge; that is to say, the object is to get at a gross dividend, which has not yet been reduced by taxation, and so can be charged presently. Obviously the comparable sums here, for the purpose of a fair and just average, are also the gross dividends before any deduction for tax has been made.

My Lords, in arriving at a conclusion, which is the contrary of that arrived at by the Commissioners, by the learned trial judge, by the majority of the Court of Appeal and above all by your Lordships, I am very sensible of my own unwisdom, but I should allow the appeal.

LORD WRENBURY. My Lords, in the case of a foreigner found in this country, residence, not nationality, is the test of the incidence of liability to income tax. Bearing this in mind I find no great difficulty in forming a judgment upon this case.

For convenience I will call the financial years 1914–15, 1915–16 and 1916–17 the first three years. The American Thread Company is a company incorporated in America which, during the first three years, so conducted its business and so controlled its affairs that, for the purposes of the Income Tax Acts, it resided in the United Kingdom and was assessable in this country to income tax on all its profits.

This was decided in 1913 in *American Thread Co.* v. *Joyce* (1), a decision of this House. It resulted that for the first three years the American company was liable to be assessed and it was assessed and paid income tax upon all its profits, and none the less because the profits were made in America. The company was resident here and was taxable here in respect of all its profits wherever made. Lord Loreburn, in his judgment in *De Beers Consolidated Mines* v. *Howe* (2), points out that for purposes of income tax the company resides where its real business is carried on and that is where the central management and control actually abides.

In truth the place of registration is no more than one circumstance to be borne in mind. In result it is in many respects comparable with the nationality of a natural person. For purposes of income tax, nationality, if the person taxed is resident here, is irrelevant. An American citizen resident in this country is taxable upon the whole profits of his business, although carried on in America. The same is true of an American corporation.

The proposition may be illustrated by the converse case of the corporation which, although registered in the United Kingdom, yet carries on its business wholly abroad. That was the case in *Egyptian Hotels, Ld.* v. *Mitchell.* (3) The fact that it was registered here did not prevail over the fact that it was resident elsewhere in the sense that its whole business was carried on and controlled elsewhere. It was held that it was taxable accordingly, that is to say, in respect only of profits remitted to this country.

The English Sewing Cotton Company during the first three years held, and they subsequently continued to hold, all, or nearly all, the ordinary shares in the American company. They were entitled to receive, and did receive, dividends in respect of them. The fund available for their payment was not the profits of the American company, but the differential sum remaining after deduction from those profits of the income tax which the American company was liable to pay

(1) 6 Tax Cas. 163.
(2) [1906] A. C. 455, 458.
(3) [1914] 3 K. B. 118; [1915] A. C. 1022.

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and had paid. And the person to make payment to them was the American company. The case was one within s. 52 of the Income Tax Act, 1842. The English company as a holder of shares in the American company was a person to whom an annual payment was made out of property of the American company in respect of which the American company was chargeable to income tax under the Act. The English company could not, during the first three years, be assessed, and was not assessed, in respect of the dividends thus received. The American company was the person, and the only person, who could be assessed in respect of the profits of the business of the American company. The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend: *Inland Revenue Commissioners* v. *Blott.* (1)

Shortly before the beginning of the fourth year the control of the American company's trade was removed to the United States. That company ceased to be resident in this country and was no longer assessable in respect of its profits. As from the date when the American company ceased to reside in this country the interest of the English company in the American company was such that the dividends they received from their shares in the American company were profits from a foreign possession. As to this there is no dispute. The Crown, however, contends that in the fourth year the English company was assessable under the fifth clause of Sch. D upon the average of the first three years of the dividends they received in those years, because (it is argued) the shares of the American company were during the first three years a "foreign possession" of the English company. The English company had other foreign possessions in respect of which it is not disputed that they were assessable under the Fifth Case. The Crown contends that in their statement of average income from foreign possessions they were bound to include a three years' average of the dividends received in the first three years upon the shares in the American Thread Company. The question is

(1) [1920] 1 K. B. 114, 130, 131.

whether in the first three years the English company's holding of shares in the American company was a foreign possession.

The English Companies Acts contain provisions under which a company limited by shares is to have "a capital divided into shares." The American law, I believe, is similar. A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital—that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital. The Crown has argued that the share is necessarily a possession in the place where the corporation is incorporated. For the purposes of the Income Tax Acts and in a case where the foreign corporation is resident here, the proposition is, I think, unsound. For all purposes of the Income Tax Acts the company when resident here is not foreign. It is taxable by reason of residence and for that purpose and all purposes of liability to income tax the company and its capital and the members' interest in the capital is not foreign when the company is resident here. It is not possible that for determining the liability of the corporation to income tax it is here and for determining that of its members it shall be at the same moment foreign. The share is a right of property in a fraction of property of which the company resident here is the owner.

Further, during the first three years, the English company had not a possession in any part of the profits of the American company in America. The possession of the English company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company

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resident here had paid income tax upon all its profits. The source was not in America, but here. The English company could not, during the first three years, have been assessed upon their shares as a foreign possession, and in the fourth year they cannot be assessed upon an average of the first three years on the footing that during those three years the shares were a foreign possession.

To ascertain whether a possession is a foreign possession or not I must look to see what is the "source of income" from which the profits of the possession arise. It is a "source of income" which the Act contemplates in all the Schedules. Sect. 52 of the Act of 1842 speaks of "the sources chargeable under this Act" and "the sources contained in the several Schedules." A profit arising from a foreign possession—a possession out of Great Britain—must be a profit coming from a source out of Great Britain. During the first three years the American company received profits arising from a source out of Great Britain, and being resident here it was liable to pay, and did pay, tax upon them, although they came from such a source. But the English company did not receive profits from a source out of Great Britain. By virtue of action taken by a person resident here (namely, by a declaration of dividend made by a corporation resident here) the English company became entitled to receive money from the company resident here. The source, so far as the English company was concerned, was the company resident here, and none the less if the dividends were remitted by cheque from America.

The appellant referred to the words "shares of any foreign company," which are found in the Income Tax Acts—e.g., in s. 10 of the Income Tax Act, 1853, and s. 36 of the Revenue (No. 2) Act, 1861—and sought to use them as an indication that a share in a company incorporated abroad is necessarily a foreign possession. My Lords, the Acts contain no definition in that sense, and the words, I think, indicate nothing of the kind. If a company is foreign by incorporation and foreign by residence, no doubt shares in the company are foreign possessions: *Gramophone and Typewriter, Ld.* v.

Stanley (1); *Singer* v. *Williams*. (2) But for the purposes of the Income Tax Acts, having regard to the provisions which render a person resident here taxable in respect of all his foreign profits, the company ceases to be a foreign company so soon as by residence it becomes amenable to all the provisions of the Acts. It cannot be foreign for one purpose of the Acts and not for another. For this reason I am of opinion, as I said at the outset, that the whole of this case is covered by the consideration that residence, not nationality, is the test relevant to liability to income tax.

My Lords, in my opinion the appeal fails, and must be dismissed with costs.

LORD PHILLIMORE. My Lords, I have read and I agree with the opinions of the Lord Chancellor, Lord Shaw and Lord Wrenbury; but I wish to add a few words.

This case seems to depend upon the following considerations: A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sch. D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon.

If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Sch. D, the money received by him in dividends.

Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double

(1) [1908] 2 K. B. 89. (2) [1921] 1 A. C. 41.

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taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the statute; it is founded upon the provisions of the statute itself; and the statute carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him.

This is the state of the law with regard to companies known as such to the Legislature. But the British taxpayer may be receiving annual sums from foreign possessions and thus become liable to be assessed and taxed on a three-yearly average computed in the same way as already mentioned, according to the fifth case of Sch. D. And it matters not what the foreign possession is, whether it is land or goods or shares in a foreign company. The periodic sums which are so remitted to him must be entered by him in his return, and are liable to assessment and taxation, not because they are dividends on shares in foreign companies, but simply because they are remittances from foreign sources.

The officers of the Crown do not know and do not care what is the character of the sources from which the money comes. It may be a company, it may be a firm, it may be the taxpayer himself trading under an alias. It may call itself a company and not be one, or be a company and not so call itself. These questions are only important if it be desired to use the machinery of the Income Tax Act, 1853, s. 10. Otherwise it is enough that the taxpayer is in receipt of income "arising from securities, stocks, shares and rents in any place out of the United Kingdom" (Finance Act, 1914, s. 5) or "sums annually received from foreign possessions," as the description in the fifth case under the Income Tax Act, 1842, runs.

But if the company removes to Great Britain and

acquires what I may call a taxable seat here, it becomes taxable as a company to which s. 40 of the Income Tax Act, 1842, applies; and as in ordinary cases of a taxed company the shareholder is taken to have paid the tax upon his dividends through the company and is not assessed or taxed upon them. This fact is conceded, if the reason be disputed.

If the company again remove itself abroad, so that it ceases to pay income tax as a company, the shareholder has as before to pay the tax upon the dividends which he receives as upon sums received from foreign possessions, because there is no longer a company that has paid income tax for him.

To make the point simple let it be supposed (though it was not so in the present case) that the taxpayer had no other source of revenue which could be brought under Sch. D. Then during the years in which the company had a taxable seat in Great Britain the shareholder if served with a notice under Sch. D would make a nil return; and he would continue to make a nil return till he had received a dividend from the company remitted to him after the company had removed its taxable seat from Great Britain.

It seems to be suggested for the Crown that a company may be a foreign company in suspense and the dividends declared by it may be treated as sums received from foreign possessions held in suspense, so that when the company goes back abroad the right to treat it as having been all along a foreign company and its dividends all along as sums received from foreign possessions revives. I doubt if this idea would ever have been entertained if the company had been originally English and there had been no question of its going back to a foreign country.

Be this as it may, I find no warrant in law for such a conception.

A company either comes under s. 40 of the Act of 1842, or it does not. If it does not, it is not taxable; but in that event those who receive dividends from it will be taxable in respect of their dividends. If it does come under s. 40,

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its shareholders are not taxable for their dividends. This is so, not because of any implied rule of law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on shares in a taxed company do not come under Sch. D.

It is sought, nevertheless, to bring these dividends under the head of "sums received from foreign possessions," though only for the limited purpose of making an average in subsequent years. If they were such sums they were taxable at the time. Nothing happened in the year 1917 to change the character of a dividend received in 1914. If in 1917 it was a sum received from a foreign possession, so it was in 1914. If it was such a sum in 1914, it ought to have been taxed then and there.

But every one agrees that this would have been absurd.

Wherefore I would dismiss the appeal.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 21, 1923.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Rawle, Johnstone & Co.*, for *Addleshaw, Sons & Latham, Manchester.*

[HOUSE OF LORDS.]

ABRAM STEAMSHIP COMPANY, LIMITED (IN LIQUIDATION) AND ANOTHER . . . . . } APPELLANTS;

AND

WESTVILLE SHIPPING COMPANY, LIMITED (IN LIQUIDATION) AND ANOTHER . . . . . } RESPONDENTS.

H. L. (Sc.)* 1923 July 6.

Contract—Rescission—Innocent Misrepresentation—Title to sue—Restitutio in integrum—Assignment of Contract—Repudiation by Assignee—Action for Rescission in Scotland by Assignor during pendency of Action for Rescission in England by Assignee—Judgment by Consent for Plaintiff in English Action before Date of closing Record in Scottish Action—Affirmation by Assignee after Discovery of Misrepresentation.

In February, 1920, the appellants, who had contracted with a firm of shipbuilders for the building of a steamer, assigned the contract to the respondents on representations, which though false were not fraudulent, that the steamer had reached a certain stage of construction. In March the respondents assigned their contract to the B. company, and in doing so innocently passed on the representations made to them by the appellants. In June the B. company discovered that these representations were untrue and complained to the respondents. On July 2 the B. company intimated to the shipbuilders their approval of a suggestion for a minor alteration in the plan of the steamer. On July 3 the B. company repudiated their contract with the respondents, who in the same month intimated this to the appellants and in turn repudiated their contract with the appellants. In August the B. company brought an action in England against the respondents for rescission, and in November, during the pendency of this action, the respondents brought a similar action in Scotland against the appellants. In December, before the closing of the record in the Scottish action, judgment in the English action was entered by consent for the plaintiffs, the respondents (defendants) having been advised that they had no defence:—

Held, (1.) that the assent by the B. company to the minor alteration in the plan of the ship did not amount to an affirmation of the contract; (2.) that the repudiation of the contract by the B. company, being justified by the facts, reinvested the respondents in their rights under the original assignment; that they had therefore a good title to sue at the time when they brought their action, and that their contract with the appellants ought to be rescinded.

Dictum of Lord Herschell in *Edinburgh United Breweries, Ld.* v. *Molleson* [1894] A. C. 96, 108 applied.

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* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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Symington v. *Campbell* (1894) 21 R. 434 distinguished.
Decisions of the Lord Ordinary and of the First Division of the Court of Session in Scotland 1922 S. C. 571 affirmed.

APPEAL from interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland. (1)

The action was brought by the respondent company against the appellant company for reduction of an agreement between the parties dated February 20, 1920, on the ground of misrepresentation.

By an agreement dated September 24, 1919, the appellant company contracted with the Dublin Shipbuilders, Ld., for the building by the latter of a steel screw steamer of 850 tons at the price of 40,000*l.*, to be paid for in five instalments of 8000*l.* each—(1.) when the keel was laid; (2.) when the vessel was framed; (3.) when the vessel was plated and ready for riveting; (4.) when the vessel was launched; and (5.) when the vessel was completed. On February 6, 1920, the appellants, on being advised that the keel was in place, paid the first instalment. About this time negotiations took place between the appellants and the respondents, through their respective brokers, for the sale to the latter of the vessel then in the course of construction. The appellants, by their brokers, Messrs. Thomas M'Laren & Co., represented to the respondents that the keel was laid, that the tank tops were being laid, that the frames were bent, and that the erection of the same was being started. These statements were made in a telegram of February 17, 1920, and were repeated in a letter of the same date. The appellants offered the ship at 58,700*l.* The respondents on the faith of the representations made by Messrs. Thomas M'Laren & Co., accepted this offer. Accordingly, by an agreement dated February 20, 1920, made between the appellants and the respondents, the appellants assigned to the respondents the benefit of their contract of September 24, 1919, with the Dublin Shipbuilders, Ld., in consideration of a cash payment by the respondents of 26,700*l.*, the respondents undertaking to pay the subsequent instalments

(1) 1922 S. C. 571.

amounting to 32,000*l.* of the original price of 40,000*l.* Shortly afterwards the respondents, realizing that they might have a difficulty in meeting the instalments as they became due, decided to resell their rights under the contract, and to this end they entered into negotiations with the British Hispano Line, Ld., and passed on to that company the information they had received from the appellants with reference to the state of progress of the building of the vessel. In reliance on these representations the Hispano Line by an agreement dated March 13, 1920, agreed to purchase from the respondents all their rights and benefits under the agreement of September 24, 1919, at the price of 33,000*l.*, and covenanted to pay the several instalments which should thereafter become due.

Early in June, 1920, the Hispano Line, never having been asked for an instalment and having heard nothing further about the progress of the ship, sent a representative to Dublin to inspect the ship, and it was then discovered that the representations contained in the telegram and letter of February 17, 1920, with regard to the state of construction of the vessel were, with the exception of the statement that the keel was laid, untrue, and that nothing had been done except the laying of the keel. Thereupon the Hispano Company complained to the respondents, and on June 21 the respondents asked for explanations from the appellants, but the latter disclaimed all responsibility.

On June 30, 1920, the appellants sent to the respondents a copy of a letter from the Dublin Shipbuilders, Ld., dealing with a minor alteration in the midship accommodation of the vessel. This letter the respondents forwarded to the Hispano Company, who, on July 2, 1920, wrote to the Dublin Shipbuilders approving of the alteration.

On July 3, 1920, the Hispano Company gave notice to the respondent company that they repudiated their contract on the ground of misrepresentation. On July 24, 1920, the respondents, having satisfied themselves about the facts, wrote to the appellants a letter in which, after reviewing all the circumstances and informing them that the Hispano

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Company had repudiated their contract and were applying to the Court to rescind the same, gave notice that they likewise claimed rescission of their contract with the appellants. On August 7, 1920, the Hispano Line commenced an action in the High Court against the respondents for rescission. The respondents intimated the action to the appellants and asked what course the appellants wished them to adopt, but the appellants made no suggestions as to defending the action. The respondents, having been advised that they had no defence to the action, submitted to judgment, and on December 11 judgment was entered against them by consent. In the meantime—namely, on November 5—the respondents brought the present action against the appellants, but the record therein was not closed until February 1, 1921. As originally framed the action contained charges of fraud, but those had since been dropped.

The Lord Ordinary (Lord Hunter) reduced the contract and ordered payment by the appellants to the respondents of the sum of 26,700*l.*, and the First Division (the Lord President, Lord Mackenzie, Lord Skerrington, and Lord Cullen) affirmed his decision.

1921. April 30; May 1. *Charles H. Brown K.C.* and *A. H. D. Gillies* (both of the Scottish Bar) for the appellants. At the date when the respondents raised this action against the appellants they had no title to sue, as they had assigned the benefit of their contract to the Hispano Line and the title remained in the hands of the sub-assignees: *Edinburgh United Breweries, Ld.* v. *Molleson.* (1) This defect of title cannot be remedied by acquiring a title after the case has come into Court: *Symington* v. *Campbell.* (2) At the time of the institution of the action the respondents were not in a position to offer restitutio in integrum, because their contract with the Hispano Line had not then been rescinded and also because the Hispano Line by sanctioning an alteration of the plan of the vessel after knowledge of the true state of the facts had homologated that contract. The respondents

(1) [1894] A. C. 96; 21 R. (H. L.) 10. (2) 21 R. 434.

had apparently a good defence to the action brought against them by the Hispano Line, and in the circumstances the consent judgment did not operate to confer upon a title to sue. Assuming that the Hispano Line had a legal ground for repudiating the contract that did not give the respondents a good title to sue until judgment had been obtained for rescission. This question was left open by Lord Herschell and Lord Watson in *Edinburgh United Breweries* v. *Molleson* (1), and Lord Skerrington was in error in deciding this question in favour of the respondents. The consent judgment cannot be read back to the date of the writ. Unless otherwise ordered a judgment takes effect as on the day on which it is pronounced.

[Counsel also contended that the misrepresentation was not material in view of the fact that no warranty was given as to the date of delivery of the ship, and that the action was barred by delay. They also referred to *Clough* v. *London and North Western Ry. Co.* (2)]

A. T. Miller K.C. (of the English Bar) and *W. G. Normand* (of the Scottish Bar) for the respondents were not called on.

The House took time for consideration.

1923. July 6. EARL OF BIRKENHEAD (read by LORD DUNEDIN). My Lords, I have had the advantage of reading the judgments herein of my noble and learned friends Lord Dunedin and Lord Atkinson. I agree with them; have nothing to add; and move that the appeal be dismissed with costs.

VISCOUNT FINLAY (read by LORD DUNEDIN). My Lords, I have had the advantage of reading the judgment prepared by Lord Dunedin and find that it exactly expresses my views on this case. I concur with it and have nothing to add.

LORD DUNEDIN. My Lords, the facts on which the question is raised in this case are as follows. The appellants

(1) [1894] A. C. 109, 113; 21 R. (H. L.) 14, 15, 16.
(2) (1871) L. R. 7 Ex. 26.

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by a contract of date September 24, 1919, contracted with a firm of shipbuilders for the building and finishing of a steel screw steamer of certain dimensions. The appellants in February, 1920, assigned that contract to the respondents. In the negotiations for assignment there were representations as to the stage of construction which the steamer had by that time reached, which representations were admittedly untrue. By the terms of the agreement of assignation the sum of 26,000*l.* was payable within twenty days of the execution of the agreement and that sum was duly paid. On March 13, 1920, the respondents assigned to the British Hispano Company for a certain consideration all the rights under the agreement. In doing so they passed on the information which they had received from the appellants as to the state of progress of the vessel.

In June, 1920, the British Hispano Company discovered that the representations made as to the state of progress were untrue. They at once repudiated the contract. The respondents gave intimation of this to the appellants and in turn repudiated their contract. The British Hispano Line, Ld., raised action in the English Courts to set aside their contract and recover the money paid under it. While that action was in dependence the respondents raised the present action against the appellants to set aside the contract and recover the money paid under it. The summons was signeted on November 5, 1920. On December 11 judgment was given in favour of the plaintiffs in the English action, the respondents in this case, defendants in that, being advised that they had no defence. The only other matter that need be mentioned is that before action raised a suggestion was made by the builders for a small alteration in the deckhouse. This was passed on by the respondents to the sub-purchasers and approved of by them.

On these facts it is admitted that there was mis-representation for which the appellants are responsible which induced the respondents to enter into the contract for the purchase of the ship with them. The materiality of such misrepresentation was not actually admitted, but it was found

by both Courts below on what I consider very clear grounds. There is, therefore, so far good ground for setting aside the contract.

The defence depends on two points: first, it is said that the respondents elected to affirm the contract after they were aware of the grounds for rescission by consenting to certain alterations as shown by certain letters. My Lords, election to affirm must, if to be gathered from action, be gathered from unequivocal acts. It is not conclusive that the act in itself was trivial, but the triviality of the act may easily affect the inferences to be drawn from it. Now, here the alteration of a certain part of the deckhouse was an alteration suggested by the builders and passed on by the respondents to the sub-purchaser. It was assented to, but I cannot for myself think that the assent to such an alteration in the circumstances can possibly be taken as a considered affirmation of the contract. The plea thus becomes equally useless to the appellants in the present action, as it would have been if it had been taken in the action brought by the sub-purchaser against the respondents. This takes away the whole sting of pointing out that the decree in that action was a consent decree. Persons cannot be held liable for not having put forward pleas which are unsound in themselves.

The second point is that the action is barred by the fact of the sub-sale. So long as the sub-sale stood, this would of course be so. As has well been pointed out by the Lord President, no one can be allowed to maintain a contract between him and another and at the same time to reduce another contract on which alone his title to make that contract depended. That was the position of Dunn in *Molleson's Case*. (1) Dunn proposed to stick to his contract with the United Breweries Company and at the same time to reduce the original contract. But here the sub-contract no longer exists. It has been put out of the way by the decision in the English Courts. I am of opinion that the dicta in *Molleson's Case* (1) provide the answer to the contention.

(1) [1894] A. C. 96, 108; 21 R. (H. L.) 10.

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It is true that Lord Watson puts the matter hypothetically, but Lord Herschell was more explicit. He says: "No doubt, if there had been any fraud, if there had been misrepresentation, it would have been open to Dunn, notwithstanding the execution of the conveyance, to set aside the conveyance and to put an end to the transaction altogether." On principle I can see no answer to this point. The subcontract, which was ex hypothesi the only obstacle, has been completely swept away. The respondents have been put back into their original position—i.e., as purchasers under the contract with the appellants. Why, then, should they not reduce that contract if they have relevant grounds to do so?

The only point remaining is founded on date. It is said on the authority of *Symington* v. *Campbell* (1) that at the date of the raising of the present action the pursuers had no title to sue and that the action is not saved by a title subsequently emerging. It is as well to set out what *Campbell's Case* actually decided.

A. purchased a vessel from B. Prior to his purchase injury had been done to the ship by the alleged fault of C.; A. raised an action against C. for damages for such injuries. Subsequently to the service of the summons A. obtained from B. an assignation of all claims competent to him against C. It was held that at the date of the summons A. had no title to sue and that a subsequent assignation did not cure that defect. But it is to be observed that there the title conferred by the assignation was a perfectly independent title. The sale of the ship by B. to A. did not convey any right to damages which were a personal right in B.; consequently the subsequent assignation could never cure the original defect in title. Here the matter is quite different: the original title to set aside a contract induced by misrepresentation was quite good. It is true that for the moment there seemed a good answer—namely: "You have parted with the subject of the contract and therefore you have lost your interest," but the moment that the instrument by which they had so

(1) 21 R. 434.

parted was swept away the original title was then in all its force.

I therefore concur in the judgment proposed.

LORD ATKINSON. My Lords, beyond concurring with the judgment which has been delivered by my noble friend who has preceded me, and expressing my high appreciation and approval of the admirable and convincing judgment which has been delivered by the Lord President of the Court of Session, I should not have attempted to add anything to what has been already said, were it not that some of the contentions urged by Mr. Brown in support of the appeal, especially on the point of the rescission of the contract of March 13, 1920, entered into between the British Hispano Line, Ld., and the respondent company, need, I think, special consideration. Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished; but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and the latter gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract. Questions as to whether the judgment relates back to a date earlier than its own are really irrelevant. So long ago as the year 1804 this was

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in effect decided by Lord Ellenborough C.J., Grose, Lawrence and Le Blanc JJ., in the case of *Hunt* v. *Silk*. (1) It was there laid down " that a contract cannot be rescinded by one party for the default of the other, unless both can be put in *statu quo* as before the contract." This decision was approved of and followed in *Blackburn* v. *Smith*. (2) There the defendant agreed to sell and the plaintiff to purchase a piece of land. The latter paid a deposit and went into possession. Owing to the events which occurred the plaintiff gave notice to rescind the contract and brought an action to recover the deposit. Parke B., when delivering the judgment of the Court, said : " We think, on the principle of the case of *Hunt* v. *Silk* (1), inasmuch as the plaintiffs had the possession of the property, and the parties could not be placed in *statu quo*, the count for money had and received "—that is, the deposit—" cannot be maintained." That means that, owing to the fact of this possession, rescission could not have its natural effect.

It may be doubted whether since the decision of the case of *Lamare* v. *Dixon* (3), to be presently referred to on another point, the same importance will henceforth be attributed to the entry into possession of land, as was given to it in these two cases. In the case of *Reese River Silver Mining Co.* v. *Smith* (4) the respondent alleged that he had been induced to take shares in the company by fraud and misrepresentation contained in the prospectus. He filed a bill against the directors, alleging that he took shares in the company on the faith that the statements made in the prospectus and articles were true and accurate, within the knowledge of the directors. But these statements, he alleged, were false, etc., etc., and prayed that his name might be removed from the register of the company. A winding-up order had been subsequently made. Smith's name was placed on the list of contributors. On July 10, 1886, he took out a summons to have the register rectified by the removal of his

(1) (1804) 5 East, 449.
(2) (1848) 2 Ex. 783, 792
(3) (1873) L. R. 6 H. L. 414.
(4) (1869) L. R. 4 H. L. 64, 73, 74.

name. The application was refused by the then Master of the Rolls. On appeal this decision was reversed by the Lords Justices, and from their decision an appeal was brought to this House. Lord Hatherley L.C., in giving judgment, said, referring to *Oakes* v. *Turquand* (1): "It appeared to your Lordships, and with all humility I would say it appears to me, perfectly correct to say that the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him whom you have sought to bind by it, that he no longer accepts the agreement but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression 'until rescinded,' used by any of your Lordships at the time when that case was argued before the House, to say that the rescission must be an act of some court of competent authority, and that, until the rescission by that court of competent authority takes place, the agreement is subsisting in its full rigour." On the next page he states what he thinks is the true view: "If in a case of this description the directors had committed the fraudulent act of putting a man's name upon the list which they ought not to have put there, and had allotted him shares, so that if it turned out to be beneficial it would be competent to the person to say: 'Now I elect to hold them, because, although coming to me by your fraud upon me, I find it is beneficial to me to hold them, and you cannot aver your own fraud to prevent my so doing'; in that case the directors could not have taken the name off the list without communication with him. But if immediately that he knows what the directors have done, he says: 'I have made up my mind to reject the contract, and I assert that intention of mine in the plainest and most open manner competent to me, by my communication to you insisting upon having my name removed, and on your neglecting your duty to remove my name I proceed to file my bill to compel you to do so,'—I take it that thereupon the contract is at an end, and the gentleman is entitled to have his name removed from the list."

(1) (1867) L. R. 2 H. L. 325.

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Lords Westbury and Cairns would appear to have approved of this statement of the law. Well, it is not now disputed that false statements were made to the British Hispano Company as to the forward condition of the ship at the time they bought her. It is not now disputed that these statements were material, neither is it disputed that, relying upon them as truthful and accurate, the company entered into the contract to purchase the ship.

On June 20, 1920, they sent their representative to Dublin to discover by inspection what was the actual condition of the ship. It was then found that all the statements as to her forward condition were untrue, that little more had been done beyond laying the vessel's keel. They then consulted their solicitors, and took a course very much like that suggested by Lord Hatherley. They wrote to their vendors, the respondents, a letter detailing the misrepresentations made to them on which they alleged they acted, and wound up the letter with this paragraph: "We must now, however, inform you that had we known the position and that your statement was incorrect we should never have agreed to purchase your contract and that in consequence of this misrepresentation we must repudiate the contract and ask you for an immediate return of the sum of 33,000*l.* paid by us. —Yours, etc."

On July 9 the solicitors again wrote: "We are instructed to again state that our clients feel that misrepresentations were made and they insist on repudiating the contract. Unless we hear from you with regard to the matter within the next few days, we are instructed to commence proceedings. —Yours, etc."

The respondents did not pay to the British Hispano Company the 33,000*l.* or any part of it. They did not accept the latter company's repudiation of the contract to purchase this ship on the ground that it was void for essential error. On the contrary, on July 8, 1920, they wrote to the latter company stating that they would hold them to their contract. The British Hispano Company was therefore obliged to

institute proceedings to enforce the rights which their election to rescind conferred upon them, and as consequential relief to procure the repayment of the 33,000*l.* The writ was issued on August 18, 1920. The respondents, according to the evidence, finding they had no defence to the action, settled it. On November 30, 1920, the solicitors on both sides appeared before the District Registrar for the Cardiff District, when, after hearing them, it was ordered that judgment by consent should be entered for the plaintiff for rescission of the contract of March 13, 1920, and for the sum of 33,000*l.* and costs when taxed. The formal Order was not drawn up till December 11, 1920. On December 16, 1920, the plaintiffs and defendants in the action entered into an agreement providing that the plaintiff company would not take any steps to enforce this judgment until judgment should be given in an action brought by the defendants in Scotland against the Abram Steamship Company, Ld., and Thomas M'Laren & Co., and that in consideration of this concession the respondents would pay interest at bank rate upon the sum of 33,000*l.* This, however, is wholly immaterial. For in truth it is not this judgment which puts an end to the voidable contract of March 13, 1920. That was done early in the month of July previous in the manner mentioned. This obviously brought it to an end, provided always that the British Hispano Company was then entitled in law to take that course. It was contended they were not entitled to take it because, with full knowledge of the deception which had been practised upon them, and of the essential error into which they had been led, they, by letter dated July 2, 1920, unequivocally expressed an intention to treat the contract of March 13, 1920, as a subsisting contract then in full force and effect, and that this election so to treat it was final and decisive. This contention is based upon two letters, the first written by the builders of the ship to the solicitor of the respondents, and forwarded to the British Hispano Company, and the second written by the latter company to the shipbuilders. The letters respectively

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run as follows. The respondents' solicitor wrote to the British Hispano Company the following letter :—

"Cardiff, July 2nd, 1920.

"S.S. No. 17.

"Dear Sirs,—We have received the following letter from Messrs. Abram & Sons, Ltd. It is more or less an extract from one received from the Dublin Shipbuilders, Ltd. :—

'With reference to the midship accommodation in the above vessel, we find that the altered arrangement which you approved some time ago does not work out very satisfactorily, as the pantry space under the winding stairs is practically valueless. We enclose blue print showing an amended arrangement in which we have changed the entrance door to the starboard side, in lieu of the after end. The ladder under this arrangement is straight and a good pantry space is obtainable. Will you kindly advise us whether this arrangement meets with your approval per return.'

We enclose herewith blue print which will explain the letter. We think perhaps it would be advisable for you to reply direct to the Dublin Shipbuilders, Ltd.—Yours, etc."

The British Hispano Company wrote to the Dublin Shipbuilders the following letter :—

"Cardiff, July 2nd, 1920.

"S.S. No. 17.

"Dear Sirs,—Referring to your letter addressed to the Abram Shipping Company, we return herewith blue print, and shall be pleased if you will proceed with the suggested re-arrangement. We shall also be obliged if you will let us know whether steamer has progressed since the writer had inspection of her some little time ago.—Yours, etc."

The law applicable to questions such as this is stated with admirable clearness and precision by Mellor J. when

delivering the judgment of the Exchequer Chamber in *Clough* v. *London and North Western Ry. Co.* (1) He expressed himself thus: "We agree with what seems to be the opinion of all the Judges below, that if it can be shewn that the London Pianoforte Company" (i.e., the company alleged to have been defrauded) "have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: *Jones* v. *Carter*. (2) We cannot do better than to cite the language of Bramwell B. in *Croft* v. *Lumley* (3), which precisely expresses what we mean." He then cites at length the well-known passage from Bramwell B.'s judgment, and states that it is applicable to the election to avoid a contract for fraud. In such cases he raises the question: "Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?" All this reasoning is obviously quite as applicable to a case of essential error as it is to a case of fraud. Turning for a moment to these analogous cases of the so-called waiver by the lessor of the forfeiture of a lease, one finds that the governing factor is the intention of the party purporting to waive it. All the cases on this point

(1) L. R. 7 Ex. 26, 34, 35.
(2) (1846) 15 M. & W. 718.
(3) (1858) 6 H. L. C. 672, 705, 707, 713.

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up to the year 1903 are collected in 1 Smith's Leading Cases, 11th ed., p. 36, and the following pages, in the notes to *Dumpor's Case*. At the bottom of p. 38 it is stated that it is conceived that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of a forfeiture. It is only evidence of the election of the lessor to retain the reversion and its incidents instead of taking possession of the land. The judgments of Bramwell B. in *Croft* v. *Lumley* (1) and also of Compton J. are referred to in support of this statement. In these passages both these learned judges refer to the strong expressions of Lord Mansfield in the case of *Doe* v. *Batten*. (2) In that case, the payment under peculiar circumstances of rent which accrued due after the alleged forfeiture, Lord Mansfield said: "The question therefore is *quo animo* the rent was received, and what the real intention of both parties was?" Bramwell B. qualifies this statement of the law by pointing out that where the intention of the parties is spoken of it is not meant that the landlord can do an act lawful only if he had a particular intention and yet say that he had it not. The judgment of Lord Cairns in *Lamare* v. *Dixon* (3), already cited, points in the same direction. In that case, Lamare, the appellant, entered into an agreement to take a lease of a house, went into occupation of the house, and occupied it for two years. From time to time he called upon the landlord to fulfil certain promises made by him, which had induced Lamare to enter into the contract. He (Lamare) paid the rent as it accrued due, but always under protest. It was held that these facts did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform his contract, but that the payments were meant to be treated as merely made in respect of the actual use and occupation of the house, and in no other character. While he was in possession of the house, he wrote to the respondent a letter containing the following passage: "I beg hereby to give you notice that if

(1) (1858) 6 H. L. C. 672, (2) (1775) 1 Cowp. 243, 245.
(3) L. R. 6 H. L. 414, 431.

you do not cause all the above matters" (i.e., repairs) "to be done upon the premises, or at least commenced, before this day fortnight, I shall myself do what is necessary and charge you with my outlay. I send you the last quarter's rent, but you will, of course, understand that I in no way abandon my claim against you for damages on account of the non-performance of your agreement in many respects." The respondent replied saying he had done all he had agreed to do, and would not do any more. Lord Cairns, in giving judgment, said: "It is quite true that Lamare said in this letter that he would do the work and sue for damages. I do not at all hold him to be concluded by that. I apprehend that he was perfectly free a week after that letter, as he was a week before, to maintain and hold his position on the non-performance of the agreement, to say, that although he had used the threat of doing the work, and suing for damages, he was not bound to pursue that course, but was at liberty to repudiate the agreement *in toto*." My Lords, I am clearly of opinion, having regard to these authorities, that the letter of the British Hispano Line, Ld., dated July 2, already quoted at length, cannot be regarded as such a positive and unequivocal expression of their election to treat the agreement of March 13, 1920, as a valid, subsisting and effective agreement, as to disentitle them to repudiate it on July 3 and 7, 1920, as in fact they did.

When the contract was rescinded and thus got out of the way, I think there was nothing to prevent the respondents from enforcing their rights against the appellants. I am of the opinion, therefore, that the appeal fails, and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I have given much consideration to this appeal; but I cannot see any object to be served by my writing a separate opinion upon it. My reason is that in the most careful judgment of the learned Lord President, I find every statement in fact and proposition in law set out in a manner which I would not wish to alter in

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any particular. I respectfully venture to adopt that opinion as expressive of my own views.

I agree to the motion proposed.

Interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 6, 1923.

Agents for the appellants: *Botterell & Roche, for John Steuart & Gillies, Writers, Glasgow, and Smith & Watt, W.S., Edinburgh.*

Agents for the respondents: *William A. Crump & Son, for Wright, Johnston & Mackenzie, Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1923 *July* 23.

A. G. MOORE AND COMPANY . . . APPELLANTS;

AND

BARKEY AND OTHERS . . . . . RESPONDENTS.

Workmen's Compensation—Arising out of and in the Course of the Employment—Miner—Onus of Proof—Breach of statutory Regulation by one or other of two Workmen—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 34, *sub-s.* 1 (*iii.*)—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A fireman and a miner acting under his directions, while engaged in clearing gas from a mine, were killed by an explosion by gas. Upon a claim for compensation by the representatives of the miner the arbitrator found that the explosion was due to an attempt to relight the fireman's safety lamp in breach of s. 34, sub-s. 1 (iii.), of the Coal Mines Act, 1911, but that the evidence did not disclose by which of the men the attempt had been made, and he refused compensation:—

Held, that, as it appeared prima facie that the miner met his death by accident arising out of his employment, the onus lay on the employers

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* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

of establishing that he had committed a breach of the regulation and that they had failed to discharge that onus: compensation should therefore be awarded.

Decision of the Second Division of the Court of Session in Scotland 1923 S. C. 46 affirmed.

Appeal from a decision of the Second Division of the Court of Session in Scotland (1) reversing a determination of the Sheriff-Substitute of Lanarkshire in an arbitration under the Workmen's Compensation Act, 1906.

The respondents, the widow and minor children of Patrick Barkey deceased, claimed compensation from the appellants in respect of his death.

The following facts were admitted or proved before the arbitrator :—

The deceased Patrick Barkey was an oncost worker in the employment of the appellants in their Blantyre Ferme Colliery. On Sunday, July 17, 1921, he was working on the night shift, which began at 11 p.m. He was engaged with Gillespie, the night shift fireman, in clearing gas from the east side section of the pit. Shortly after they started work an explosion took place, and both men were killed.

In the afternoon of that day two firemen were engaged in clearing the gas from the east side section of the pit. In doing such work men always worked in pairs. They did not complete the clearing of the gas during their shift, and when they came to the surface they explained to Gillespie, the night shift fireman, what they had done, and that there was still some gas to clear. When Gillespie and Barkey went down the pit, Gillespie called on Barkey to assist him in clearing the gas away. He was entitled to do so, and Barkey was bound to comply. Gillespie had a Glennie (oil) safety lamp, which discloses the presence of gas by burning low or going out altogether. Barkey had an electric safety lamp, which does not disclose the presence of gas.

By s. 34, sub-s. 1 (iii.), of the Coal Mines Act, 1911, it is provided that in any part of a mine in which safety lamps are required to be used : " A safety-lamp shall not be unlocked except at an appointed lamp station (which shall not be in a

(1) 1923 S. C. 46.

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return air-way) by a competent person appointed in writing by the manager for the purpose, nor, except in the case of electric hand-lamps, shall it be re-lighted except by such a person at an appointed lamp station after examination by him, and no person other than such person as aforesaid shall have in his possession any contrivance for re-lighting or opening the lock of any safety-lamp." This enactment was in force in Blantyre Ferme Colliery, and was duly posted. The appointed lamp station was on the surface. When a Glennie lamp became extinguished below ground, it was necessary to bring it to the lamp station on the surface in order to have it relighted.

As soon as the explosion was reported, a rescue party went down the pit. They first found Gillespie's body, and then Barkey's body twenty feet further in. Both men had their caps on, and were lying on their faces with their heads outwards looking away from the face, and towards the end of the road. The safety lamp was found in two pieces. This could not have been caused by the explosion, because the lead rivet had been removed, and the bottom of the lamp had been unscrewed from the top. Some one must have taken it to pieces, and the natural inference was that the lamp had gone out and had been unscrewed with the view of relighting it. Barkey's electric lamp was found still alight. The men and the lamps were found almost in a straight line in the following positions: (1.) The electric lamp still burning within a few feet of the coal face; (2.) the top of the Glennie lamp fifteen feet from the face; (3.) the bottom of the Glennie lamp eighteen feet from the face; (4.) Barkey's body thirty feet from the face; (5.) Gillespie's body fifty feet from the face. On the following day, on the occasion of the visit of the miners' inspector, a small tin box with matches was found between the two portions of the Glennie lamp. The ownership of this tin box was not proved. The lamp-man was sure that Gillespie left a wooden pipe and a box of matches in the lamp-room on the surface. They were not produced. Barkey's son stated that he never knew of his father carrying such a tin box for any purpose. Both men were smokers.

It was not proved which of the men had the matches which were used in relighting the lamp.

The explosion was due to an attempt to relight the Glennie lamp in breach of the above-quoted section of the Coal Mines Act, 1911.

It was impossible to say who opened the lamp and who attempted to relight it. It was Gillespie who had control of the Glennie lamp, but the two men were working together.

The arbitrator refused to award compensation. He was of opinion that, as the appellants had proved that the accident was due to the breach of a provision of the Coal Mines Act, the onus was on the respondents to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge that onus.

The question of law for the opinion of the Court was whether on the foregoing facts the arbitrator was entitled to find that the accident to the deceased did not arise out of his employment with the appellants.

The Second Division (the Lord Justice-Clerk, Lord Hunter, and Lord Constable) answered this question in the negative, and reversed the determination of the Sheriff-Substitute and remitted to him to award compensation.

Graham Robertson K.C. (with him *Albert Russell*) (both of the Scottish Bar) for the appellants. It was proved that the explosion was directly caused by an act done in breach of a statutory prohibition by one or other of the two men or by both acting in concert. In these circumstances the arbitrator was entitled to hold that the onus was on Barkey's dependents to prove that the accident arose out of his employment and that they had failed to discharge that onus.

[He referred to *Marshall* v. *Owners of S.S. Wild Rose.* (1)]

J. L. Wark K.C. and *J. B. Paton* (both of the Scottish Bar) for the respondents were not called on.

Viscount Haldane. My Lords, this is an appeal from the Second Division of the Court of Session in which, differing

(1) [1910] A. C. 486, 492.

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from the Sheriff-Substitute, who was arbitrator under the Workmen's Compensation Act, they held that compensation should be given. The circumstances of the accident out of which the claim to compensation arose were these. Barkey, the deceased workman, was an oncost worker in the appellants' employment, and he went down the appellants' pit with one Gillespie, the night shift fireman, to assist the latter in clearing away gas. The operation is one in which the men engaged always work in pairs, and Barkey was bound under the terms of his engagement to go down with Gillespie if called upon. He did go down, and he and Gillespie were employed in driving out the gas. There is no doubt at all that when the accident happened to which I will refer in a moment they were in the course of their employment, and as they were driving out gas there is no doubt at all, in my opinion, that they were also engaged in employment out of which the accident which I am going to describe happened.

Their business being to drive out the gas they had to find out whether the gas was there. That business appears to have devolved upon Gillespie. Barkey had an electric lamp which does not detect whether gas is present or not, but Gillespie had an oil lamp which I presume requires a certain amount of oxygen, and the oxygen would be impeded if various noxious gases were present in the atmosphere, and so might go out. That is all we know. The rest comes from conjecture. There is no doubt an explosion took place which killed both men, and the explosion must have taken place near the face, and apparently the men were running from it. Barkey's electric lamp was not put out and remained burning, but Gillespie's lamp was found unscrewed, and unscrewed in such a way as looked as if it must have been done by the person handling it, and done for the purpose of relighting it. Probably—and I think it is quite a legitimate inference in the circumstances—it had gone out, and he was trying to relight it improperly. He ought to have taken it to the place where the lamps were allowed to be relit, which meant his going to the surface again; and possibly to save himself trouble he did not do so. Anyhow there was an explosion,

presumably due to an attempt made on his part to light the lamp. There was evidence that Gillespie had left his pipe and matches behind when he went down the shaft, but miners sometimes carry loose matches about with them, and it may be that he had loose matches. Anyhow there is no evidence to show that Barkey took down any box of matches or any matches at all, and although there was a tin box of matches found the day after near the scene of the explosion there is no evidence to show when that box got there or how it got there, and there is the evidence of Barkey's son that his father never had such a box.

Now, under these circumstances the Sheriff-Substitute has said: "There is no doubt that the accident arose in the course of the employment, but I think that Barkey's representatives are bound to prove that it arose out of his employment, and they have not discharged the onus, and therefore Barkey's representatives are not entitled to recover."

My Lords, I think in saying so the learned Sheriff-Substitute made a mistake as to the onus of proof. As soon as it was shown, as it was shown, that Barkey was acting in the course of his employment, and that the accident arose out of the employment in so far as he was actually doing his work when the accident took place, then prima facie he was within the statute, and he could only be taken outside the statute if it is proved that he himself added a peril or did something which took his action outside the scope of his employment.

Now there is no evidence of that at all. There may be evidence that Gillespie did something of the kind, that question is not before us; but there is absolutely no evidence as regards Barkey. Barkey may possibly have seen Gillespie trying to light the lamp, and may have protested unavailingly, and the accident happened. And there are half a dozen other possibilities and conjectures which one may put in the same way, each of which is as likely as the other—as likely as the other, because there is not a particle of evidence by which we can tell what happened. You may have to go on circumstantial evidence in such cases; you may have to find that a

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fact happened which it is reasonably probable did happen; but the reasonableness of the probability must be a reasonableness which the law recognizes, and depend on facts and evidence of which the law takes cognizance. Of such facts and such evidence there is not a trace in the present case.

The learned judges of the Second Division, feeling this, reversed the Sheriff-Substitute and held that there was not that onus upon the representatives of Barkey which the Sheriff-Substitute had held there was, and they decided that the onus really lay upon the appellants, and that they had not succeeded in discharging it.

With that view I find myself in entire agreement, and I move your Lordships that this appeal be dismissed with costs.

Lord Atkinson. My Lords, I think the learned arbitrator in this case has misapplied a well-known principle of law which has been laid down again and again in your Lordships' House. It would appear to me to be quite obvious that this miner had been sent down to clear the gas and was employed by his employer to do that thing, and if an accident arose while he was doing that, it was prima facie an accident arising out of and in the course of his employment entitling him to compensation. Of course it was competent for the employer in his turn to say: "Oh, the accident was not caused by a risk arising out of the employment; it was due to a risk which you yourself voluntarily incurred and which you were in no sense employed to incur." Well, there is not a particle of proof of anything of the kind. In fact the arbitrator himself finds: "It is impossible to say who opened the lamp, and who attempted to relight it. It was Gillespie who had control of the Glennie lamp, but the two men were working together." That is, they were on the same job, not that they were in intimate association generally.

Then he proceeds: "The onus was on the Appellants to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge this onus."

In my opinion that is entirely wrong. If the employer

wants to show that the workman has incurred some added risk which does not arise out of his employment, and which he is not bound by his contract of service to encounter, then the employer must do that, and do that by satisfactory evidence. There is no evidence at all here to establish that in this case. It is quite as consistent with the evidence that Gillespie uncovered this lamp as that Barkey did, indeed it is more consistent. Barkey is in no way brought into connection with it, and I think the learned arbitrator was entirely mistaken in the rule that he laid down, and that the judgment appealed from is absolutely right.

Lord Shaw of Dunfermline. My Lords, I agree with the views which have been delivered to the House by my noble and learned friend opposite.

Lord Parmoor. I agree. I think that there is no evidence to connect the deceased with the breach of the statutory duty which caused the explosion or to show that the deceased in any sense undertook a voluntary added peril outside the scope of his employment. In the absence of such evidence there is no room for such a presumption as that on which the learned arbitrator has acted.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, July 23, 1923.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agent for the respondents: *D. Graham Pole, for J. & J. Gartshore Scott, Glasgow, and R. D. C. M'Kechnie, Solicitor, Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1923
July 20.

COMMERCIAL CREDIT COMPANY OF CANADA, LIMITED . . . . . } APPELLANTS;

AND

FULTON BROTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nova Scotia—Bill of Sale—Registration—"True copy"—Bills of Sale Act (Stat. of Nova Scotia, 1918, c. 11), s. 8, sub-s. 2.

The Bills of Sale Act of Nova Scotia, 1918, s. 8, by sub-s. 2 provides as to instruments within the Act that a "true copy" is to be filed in the registry, and by sub-s. 6 enacts that in default the instrument is to be null and void against creditors, purchasers, and mortgagees. An instrument within the Act described a motor vehicle to which it related as "model 10, 3½-ton special equipped Stewart, serial no. 10,215," and stated that the price "included accessories." The copy filed stated the same serial number, and model number, and the name "Stewart," but gave the weight as 3¼ tons, which feature alone was stated as constituting the "type of body"; the copy also omitted to state that the price included accessories, of which there were several. In the copy, which was made on a printed form differing from the printed form on which the original was made, two conditions in the original were added to; although these additions did not affect the title of a purchaser, they were material to the contract between the parties to the instrument:—

Held, that the document filed was not a "true copy" of the instrument and was null and void against purchasers.

Consideration of the effect of the words "true copy" in the sub-section.

Judgment of the Supreme Court affirmed.

APPEAL (No. 101 of 1922) from a judgment of the Supreme Court of Nova Scotia (March 25, 1922) reversing a judgment of Russell J. (October 6, 1921).

The action was brought by the appellant against the respondents to recover damages for the conversion of a motor vehicle. The trial judge, Russell J., gave judgment for the plaintiff, but upon appeal that judgment was reversed and the action dismissed.

The facts material to the ground of the present decision appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD PHILLIMORE.

1923. June 18, 19. *Tilly K.C.* for the appellants.

W. C. Macdonald K.C. and *Hon. Geoffrey Lawrence* for the respondents.

July 20. The judgment of their Lordships was delivered by

LORD SUMNER. Among the many questions which have been discussed in this case there is one which lies at the threshold of them all. The appellants, plaintiffs in the action, are assignees of an agreement made between one Watt and the Automotive Supply Company, Ld., both of Halifax, Nova Scotia, and they sue to enforce the rights which that agreement purported to reserve to Watt. The first question is whether that agreement is valid or enforceable at all, it being admittedly one to which the Bills of Sale Act of Nova Scotia applies.

Watt's business was to sell Stewart motor trucks, which were supplied to him by the Stewart Motor Corporation, and about the time in question—namely, March, 1920—a course of business existed under which he sold them to the Automotive Supply Company on deferred payment terms. He financed his transactions by forthwith assigning his reserved interest to the appellant company and discounting his drafts with them. The part played by the Automotive Supply Company was an independent one in law rather than in fact. It was a company formed by Watt to acquire a retail business, which he had purchased. He was its president and held 92 per cent. of the shares, and the remaining 8 per cent. were held by his two employees, a bookkeeper and a mechanic, to whom he gave their holdings. Watt in his turn was closely associated in this series of transactions with the appellant company. In that now in question, and apparently in others, the bargain between Watt and his company was expressed on a printed form supplied by the appellants. The agreement was assigned on the same day on which it was made, and when it was subsequently registered as a bill of sale, the appellants' forms and, inferentially, their clerks were employed. Some weeks after the transaction now in question the Automotive Supply Company, to whom

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Watt had delivered possession of the truck, sold it in the course of their business to the present respondents, who were purchasers for value without notice, and they paid for it and took it away. This action was brought to recover from them the truck or its value in detinue or conversion, the Automotive Supply Company having failed to comply with the terms of the original agreement, subject to which alone the property would pass to them.

The Nova Scotia Bills of Sale Act requires that the transactions to which it applies shall be written in a certain form and registered under certain formalities. It does not require that the agreement shall be wholly expressed in a statutory form, but only that it shall be evidenced by an instrument in writing, showing the terms of the agreement, and shall be duly signed, and "shall have written or printed therein the post-office address," in this case, of Watt. This is s. 8, sub-s. 1. Sub-s. 2 prescribes that within ten days of the delivery of the chattel "a true copy" of such instrument shall be filed, accompanied by an affidavit of one of the parties, stating among other things that the copy "truly sets forth the terms, nature and effect of the agreement between the parties." Sub-s. 6 expressly provides that, if a copy is not filed as required by sub-s. 2, the agreement shall as against the purchasers of the bargainee be "null and void." There is no such express provision in the case of sub-s. 1.

The general framework of the instrument, which bears date March 22, 1920, is that the names of the parties of the first part, "hereinafter called the manufacturer," and of the parties of the second part, "hereinafter called the dealer," are filled in, blanks being provided for the purpose, and it witnesses that "the manufacturer" agrees to sell and "the dealer" agrees to purchase a motor vehicle, particulars of which are inserted in a printed form of schedule, which has columns headed by titles and is crossed by lines filled in with written words and figures. Then follow seven paragraphs of terms and conditions, under which the ownership of the motor vehicle and all its equipments and attachments remains with the manufacturer till payment is made in full.

One is that the dealer agrees to provide a proper storage place for the vehicle and its attachments, and will not remove it or them without the manufacturer's previous consent in writing; another is that on payment in full the title forthwith vests in the dealer, and that the manufacturer upon default in the observance of any condition is to be entitled to retake possession. Part payment of the price by, and delivery of possession to, the dealer in fact took place, apparently at the same time as the date of the agreement.

In the original instrument the address of Watt was not filled in along with his name in the blank space left for the name of the manufacturer, but after the name of the Automotive Supply Company there was added " 9, Blower Street, Halifax." The words accordingly ran thus, the writing being the part indicated by italics: " between *W. Walter Watt*, hereinafter called the manufacturer, and *Automotive Supply Co., Ltd.*, of (address) 9, *Blower Street*, *Halifax*, hereinafter called the dealer, witnesseth . . . . "

This agreement was duly signed by both parties, but no address was added to either signature. A form of assignment was indorsed on the back of the same sheet of paper as that on which this agreement was printed, and, when Watt executed this assignment on March 22, 1920, in favour of the appellants, he wrote beneath his signature the words " Blower Street, Halifax, N.S." It is suggested that this was Watt's post-office address, as it certainly was of his company. Jensen, the book-keeper and secretary of this company, says in his evidence that the post-office address of Watt was 9, Blower Street, and 124, Hollis Street. Watt only gives the latter address, and Jensen adds that Watt did not keep his own business and that of the company separate. It has not been found in the Courts below in favour of the appellants that Blower Street truly was a post-office address of Watt, though the judgment of the Chief Justice of Nova Scotia takes this to have been the fact; and their Lordships are not prepared to assume that it was. The trial judge would, however, appear to have assumed that it was an address available to Watt as a matter of practice, for in finding for the appellants

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he says: "the words can be read as giving the address of the bargainor Watt. The address 'of Blower Street' can be read as being applicable to both the parties named, and, if the words can be so read, the maxim 'Ut res magis valeat quam pereat' obliges us to read them in that way." With this their Lordships are unable to agree. Whatever may be the case with the construction to be put upon the conduct of parties, it is not easy to see how the words of an instrument in writing, as to which a statute makes a plain and imperative requirement, can be construed in one sense rather than in another merely in order to apply the words of the statute in such a manner as will support the interest of the person or his assignee, who is bound to carry out the statutory form, against the interest of an innocent party, who is a stranger to the whole transaction and is the person entitled to the protection of the statute. In any case it seems to their Lordships that the attribution to Watt of the words "9, Blower Street, Halifax," in this agreement is grammatically impossible as a construction, for it would treat the whole sentence as if the word "both" were inserted between the words "Automotive Supply Co., Ltd.," and "of (address)." The appellants, in printing the form with the singular "address" in this position, instead of the plural "addresses," have in fact assisted to make compliance with the statute unlikely, for the insertion of the bargainor's post-office address, the only one that is indispensable, is rather discouraged thereby than provided for, nor can the defect be supplied by the fact, if fact it be, that 9, Blower Street, was Watt's own post-office address and not merely that of his company.

Two further answers to this point were attempted: First, that the affidavit made for the purposes of registration, which gives Blower Street, Halifax, as Watt's address, may supply the omission in the written instrument, and, secondly, that, as the section does not in terms say that an instrument which does not comply with its requirements shall be null and void, there is no reason why the Courts should pay any attention to it. The answers are, to the first, that what is required is the insertion of the address in the instrument evidencing the

agreement and not its insertion in some other instrument, and that to make this omission good by extrinsic evidence is to prevent the instrument itself from being completed as the statute requires; and to the second, that a Court has no power to ignore what a statute commands, whether the statute expresses or does not express the penalties for failure to obey it. Sub-s. 1 lays down an exclusive rule of evidence. The Court is not called on to say that the agreement is void, but that it is not duly proved, and not being proved is inadmissible and must be ignored. It only becomes necessary to say that the agreement itself shall be null and void when, as in the case of sub-s. 2, the Act provides that, unless certain formalities subsequent to and outside of the agreement itself are duly gone through, the agreement, however fully evidenced, and not merely the registration of it, shall be void. The Act might have let the agreement stand, if duly evidenced, even though not duly registered. A stricter course was taken, and though admissible in evidence as duly embodied in writing, it is nullified in the absence of due registration, no doubt in order to induce the publication of such bargains.

When the instrument came to be registered, a copy was used, as to which the question is whether it was a "true copy." Let it be added, a true copy "within the meaning of sub-s. 2." Though importance is sometimes attached to such a qualification, it is doubtful if it makes any difference. The person who made the copy appears to have been more than commonly indifferent to accuracy and careful to save himself trouble. Instead of taking the instrument and copying it, he took a printed form and filled it up, and unfortunately the printed form was not the same form, and the filling in was not the same filling in as in the case of the original. Hence the question arises, whether the resulting copy (for it was sufficiently like to be a copy) was a true one within the meaning of the sub-section.

Between the instrument itself and the copy there are several differences, and between the bill of exchange, which is on the same piece of paper as the main contract, and is detachable from it by perforations, and the copy of it,

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which is similarly made part of the copy of the main contract, the number of discrepancies is surprising. Their Lordships, however, only rely on two principal differences; not that an accumulation of small divergencies, each unimportant in itself, may not in some cases prevent the copy from being a true copy, but merely because in the present instance these two suffice. The bill of exchange may well be regarded as being only part of the performance of the contract, which is itself the bill of sale; for the schedule of payments in the contract provides for the giving of a draft on account of the price. The differences found in the so-called copy of the bill of exchange, which are many and remarkable, accordingly only serve to support the inference of the unreality of the whole transaction, on which Ritchie J. relied, and do not go to the untruth of the material copy, the copy of the agreement. Similarly the original contract describes Watt as "hereinafter called the manufacturer"; in the copy he is "hereinafter called the principal." It is certain that he was not a manufacturer, and it is doubtful if he was a "principal," for, according to the treasurer of the Stewart Motor Corporation, his business was that of distributing agent of Stewart Motor Trucks in the Maritime Provinces of Canada. The expression, however, is merely descriptive, and is adopted in the appellants' printed form to save the repetition, clause by clause, of the actual name, "Walter W. Watt." This difference may therefore be put on one side.

The two points to which their Lordships attach importance are these. Each agreement, the original and the copy, purports to describe a particular chattel, to which the bargain applies. In the original that chattel is a motor vehicle described by its serial number, and also by its "type,"—namely, "model 10, 3½-ton special equipped Stewart," and its price is "including accessories." The copy describes it by the same serial number, and the same number of model, and by the name "Stewart," but in the copy it is said to weigh 3¼ tons, which feature alone constitutes its "type of body," and the "goods and chattels" which are sold are thus described without any mention of the inclusion of

equipments or accessories at all, though the price is the same as that, which in the original bargain is the price "including accessories." The accessories are of some importance, for the original invoice from the Stewart Motor Corporation to Watt shows that they consisted of "cord tyres; electric equipment; a hubodometer; stake body and cab; windshield." It follows that, if any one, proposing to purchase of the Automotive Supply Company the vehicle, which Watt had delivered to them, were to search the register, he would find a "true" copy that would leave him in doubt, to say the least of it, whether the registered transaction referred to this particular vehicle or not, and in no doubt at all that, at any rate, it did not include the accessories—the "hubodometer," the "stake body" and so on. It is to be observed that the Act avoids the transaction, when a true copy is not filed, not as against purchasers who are deceived by the copy or who even actually inspect it, but as against all purchasers as such, whether they ever see the copy or not.

In the second place the original instrument contains a series of "terms and conditions" which the parties mutually covenant to observe. Two of these terms are much shorter in the original than in the copy. In one the dealer, that is the Automotive Supply Company, binds itself to agree to indemnify any bonding company from its liability on any bond of indemnity that it may have given to Watt; in the other the dealer agrees that any dealing on its part contrary to the terms of the agreement shall be construed as being and is admitted to be criminally actionable under the Criminal Code. It is true that the added terms which impose further burdens on the dealer do not directly affect the title of Watt or the infirmity of the title of an intending purchaser; but, as avoidance is independent of actual inspection of the copy, this does not seem to matter. The discrepancy is one which clearly militates against the truth of the copy, and even if the test of untruth be the materiality of the discrepancy their Lordships do not see how a term which the parties have thought fit to insert in the original in one form can be deemed to be so far immaterial, that its expression in the copy in

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another form and with another legal effect can be dismissed as immaterial. What the parties think fit to stipulate with one another in their contract they themselves make a material part of their contract. Something more produces just as untrue a copy as something less, for it is not the same as the true contract, but is different.

In a question of statutory form like the present the authority of decided cases is not lightly to be departed from. In Nova Scotia there appears to be no decision that is in point, and in considering the English authorities the distinction should be borne in mind between decisions on the Bills of Sale Act, 1878, which required due registration and avoided instruments not expressed in accordance with s. 8, and decisions on the Amending Act of 1882, which avoided instruments, "unless made in accordance with the form prescribed therein." It has been said: per Kay J., *Sharp* v. *McHenry* (1), that a copy is true if it is true in all essential particulars, so that no one can be misled as to the effect of the instrument, but that if the true effect is misstated it is immaterial whether it is misstated in favour of one party or of the other. This proposition, which has often been quoted, would appear to be fatal to the copy now in question, at any rate in respect to the two main matters above set out, and yet, strict as it is, even it may be unduly favourable to departures from literal accuracy, for Lord Macnaghten says: *Thomas* v. *Kelly* (2), speaking of the statutory form, that he was inclined to doubt whether a bill of sale would not be void, though it did not alter the legal effect at all or mislead anybody, but simply did not agree with the prescribed form, and he adds "certainly it is if it departs from the statutory form in anything which is characteristic of that form." An expression used by Lush J. in *Burchell* v. *Thompson* (3) was relied on by the learned Chief Justice of Nova Scotia. It was that the criterion is "whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to

(1) (1887) 38 Ch. D. 427. (2) (1888) 13 App. Cas. 506, 520.
(3) [1920] 2 K. B. 80, 87, 102, 106.

the effect of the original." This phrase, which did not purport to be an exact or exhaustive summary of the decisions, was used in a case where Sankey J. considered the variance to be a mere clerical error, and Lush J. deemed it to be unimportant. The Court of Appeal took the opposite view of the error itself. Scrutton L.J. confined the matters in which error is unimportant to those "which do not in any way affect the purpose for which a true copy is required"; and Atkin L.J. observes that "as in the original the words are material, they ought to have been in the copy." Their Lordships can find nothing in the decided cases to warrant the view that such discrepancies between the original and the copy as exist in the present case and are above described can be reconciled with the truth of the copy. Who can say that if the copy had been inspected in order to find out the true position of the Automotive Supply Company, the intending purchaser would not have been misled? The Act promises him, if he chooses to make use of it, a true copy, not a puzzle. He is to inspect it, not to recover the original by a process of conjectural emendation. The vehicle might not be the same vehicle at all, and whether the terms of the copy were substantially the same in effect as well as in language as the original would be a question, if ever the original was produced, to be resolved by lawyers and not by plain men of business.

For these reasons their Lordships are of opinion that the instrument was inadmissible as not embodying the particulars which the statute requires, and that, the registration not being effected by a true copy, the agreement purporting to be thus registered is null and void under the Act as against the respondents. These conclusions make it unnecessary and therefore undesirable to express any opinion on the other points discussed in the judgments of the learned members of the Supreme Court of Nova Scotia, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Linklater & Paines.*

[PRIVY COUNCIL.]

J. C.* 1923 *July* 27.

UNITED STATES FIDELITY AND GUARANTEE COMPANY . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Succession Duty—Surety Bond—Property coming into the Hands of Executor—Property vesting in Executor as Devisee—Determination of Amount of Duty—Acceptance of Executor's Valuation—Succession Duty Act (R. S. B. C., 1911, *c.* 127), *ss.* 22, 24, 43.

Q., who was executor and sole devisee under the will of a testator domiciled in British Columbia, and the appellants executed a bond for the payment of succession duty under the Succession Duty Act (R. S. B. C., 1911, c. 127). The bond, which was in the form provided in the Schedule to the Act, described Q. as executor, and was defeasible upon his paying all duty to which the property, estate, and effects of the testator "coming to the hands of the said" Q. might be found liable under the provisions of the Act:—

Held, that Q. and the appellants were liable under the bond for duty in respect of real property which passed to Q. as devisee, although it had not vested in him as executor.

Held, further, that the Auditor-General having determined under s. 22 the amount of duty payable, accepting a valuation of the property contained in the affidavit made by Q. under s. 21, and the procedure under s. 43 for a determination by a judge not having been invoked, the amount payable could not be questioned; *quaere*, whether in the circumstances it would have been open to Q. or the appellants to invoke that procedure.

Judgment of the Supreme Court affirmed.

APPEAL (No. 74 of 1922), by special leave, from a judgment of the Supreme Court of Canada (May 21, 1922) dismissing, upon an equal division of opinion, an appeal from the Court of Appeal of British Columbia, which affirmed, subject to a variation, a judgment of the Supreme Court of that Province.

The appeal arose out of an action brought by the Crown, represented by the Attorney-General and the Minister of Finance of the Province, against L. J. Quagliotti and the present appellants, upon a bond entered into by them on

* *Present:* EARL OF BIRKENHEAD, VISCOUNT HALDANE, LORD SUMNER, and SIR HENRY DUKE.

July 29, 1913, for the payment of duty under the Succession Duty Act (R. S. B. C., 1911, c. 127). The main question for determination was whether the executor was liable to pay duty in respect of real property which passed to him as devisee under the will but which, under the law as it stood at the death of the testator, did not vest in him as executor. The appellants raised a further question—namely, whether before action there had been such a determination of the amount of duty payable, as to enable the action to be brought.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Gregory J.) gave judgment for the amount claimed, and his judgment was affirmed by the Court of Appeal, subject to striking out a part of the judgment which related to the superior rights of innocent purchasers for value. An appeal to the Supreme Court of Canada (1) was dismissed, the learned judges being equally divided in opinion; the Chief Justice, Idington and Brodeur JJ. considered that the appeal should be dismissed, while Duff, Anglin and Mignault JJ. took the contrary view.

1923. July 5, 6. *Tilly K.C.* for the appellants.

Clauson K.C., *Farris K.C.* and *Hon. Geoffrey Lawrence* for the respondents.

July 27. The judgment of the Judicial Committee was delivered by

SIR HENRY DUKE. This is an appeal from a judgment of the Supreme Court of Canada affirming judgments of the Court of Appeal and Supreme Court of British Columbia, whereby upon a bond given to secure payment of Succession Duty under a statute of British Columbia, $44,287.50 was found payable by the obligors of the bond, the now appellants, and one Lorenzo Joseph Quagliotti. Two questions are involved which depend for their decision upon the true construction of the bond upon which the action in the

(1) 64 Can. S. C. R. 48.

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Supreme Court was founded and the effect of certain sections of the statute in question, the Succession Duty Act (R. S. B. C., 1911, c. 127).

Petronilla Quagliotti, wife of Lorenzo, died in May, 1913, having by her last will, dated in April, 1913, devised and bequeathed all her real and personal estate to her husband and appointed him her sole executor. Quagliotti, as executor, applied in the Supreme Court for, and in due course obtained, a grant of probate of the will.

The Succession Duty Act provides for ascertainment upon the death of any person of the whole value of the property of such deceased person and payment out of or in respect of the same of a duty, similar in some respects to the estate duty which was imposed in the United Kingdom by the Finance Act, 1894, which duty by s. 10 of the statute is to be "deducted from the share of each person entitled to share in the estate." The duty is declared "payable at the death of the deceased." In order to its enforcement, the statute enacts that on any application for probate or letters of administration, the amount of the succession duty payable shall be determined in manner thereby directed and (1.) immediate payment made, or (2.) a bond given by the applicant or applicants with a surety or sureties, conditioned for "the due payment of any duty to which the property coming to the hands of the applicant or applicants may be found liable." The Act further provides, by s. 42, that any sums payable thereunder shall be recoverable by action in the Supreme Court.

The succession duty payable upon the estate of Petronilla Quagliotti was ascertained at $44,287.50, the bond in question was taken for a penal sum of $88,575, being, as the statute requires, 10 per cent. of the sworn value of the property of the testatrix, and the condition of the obligation was that: "Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti . . . . do well and truly pay or cause to be paid . . . . any and all duty to which the property estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be

found liable under the provisions of the Succession Duty Act, within two years from the date of the death of the said Petronilla Quagliotti. . . . ."

The personal property which passed under the will was no more than $500; and there were medical and funeral expenses which amounted to $750. The expenses of obtaining probate, including probate duty and the costs incidental to the bond for succession duty, were therefore testamentary expenses which fell to be provided out of the real estate. This was valued by the executor in his affidavit to lead probate at $886,000. The title of the executor to the realty in question was incomplete for want of compliance with the law of the Province with regard to the registration of land titles.(1) The true value at the time of the death was declared by the learned judge at the trial to have been no more than $500,000.

Action was brought in 1920 by the Minister of Finance against the executor and his surety to recover the succession duty of $44,287.50 and at the hearing two defences were raised—first, that nothing had come to the hands of the defendant Quagliotti, within the meaning of the bond, and secondly, that no property of Petronilla Quagliotti had been found liable to succession duty in accordance with the provisions of the Succession Duty Act. Evidence was also given to show that Quagliotti when he valued the property of the testatrix for probate at $885,750 was mistaken in various material particulars. The defences raised were overruled and judgment was given for the Crown, and so far as is material was affirmed upon appeal. In the Supreme Court of Canada the learned judges who heard the appeal to that Court were divided in opinion, three against three, and the appeal to the Supreme Court accordingly failed.

The meaning of the words in the bond "property estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti" is purely a matter of construction. Whether the realty in question came to the hands of Quagliotti as executor or otherwise is a mixed question of law and fact. The contention of counsel for the

(1) See now Land Registry Act, 1921, s. 26.—A. M. T.

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appellants upon the point of construction was that the words cited apply to the property only which came to the hands of Quagliotti as executor, that is to say, became by operation of law vested in him in his capacity of executor. Counsel contended also that, in the circumstances of the case, notwithstanding that Quagliotti as devisee under the will dealt with or disposed of the devised realty in various ways, yet in the absence of legal or equitable title in him which resulted from non-registration of title, no property could be said to have " come to his hands " in any accurate sense of the term.

Some limitation of the generality of the words in the condition which define the property subject thereto was contended for by counsel for the appellants as resulting by necessary implication, and Mr. Tilley contended in support of the construction for which he argued that regard must be had to the nature of the application for which the bond was required—namely, a grant of probate to an executor. He urged also that, so far as Quagliotti was concerned, the bond ought to be deemed to be so expressed as to bind him only as executor, its condition of defeasance being that he, " the executor," should pay such duty as is specified. It was therefore claimed that the generality of the words " the property, etc., of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti," should be restricted so as to limit the obligation enforceable under the bond to the payment of duty on property coming to Quagliotti in his named representative capacity.

What was called a strict construction was also contended for on the grounds that the statute prescribing the making of the bond and its form, the Succession Duty Act, is a taxing statute, and that the Crown as the obligee ought as between two alternative possible constructions to be held bound by that which should be found the more favourable to the obligor. Further, the appellants' position as surety was relied upon.

On the part of the respondent the argument was that the language of the bond upon a fair attention to its terms is free from ambiguity, that the description of Quagliotti as executor has no necessary or proper effect which requires or warrants

the introduction of the words "as executor" to narrow the description of property coming to him upon which the effect of the condition depends, and that the provisions of the Succession Duty Act which regulate the taking of a bond from any applicant for probate or letters of administration are such that the intention of the Act would in many cases be defeated by introducing the suggested words of limitation.

Where there are alternative possible constructions of an instrument such as is here in question, it is proper and indeed necessary to refer to the statute by which the form and purposes of the instrument are prescribed in order to make sure that the construction determined upon is consistent with the provisions of the statute.

The object of the Succession Duty Act is to secure to the Crown by a charge which attaches to the whole of any estate passing upon death of a domiciled subject a fixed proportion of the entire value of the estate. The relative duty is directed to be deducted from the share of each person entitled to share the estate. Executors or administrators or trustees are empowered to sell the property of the deceased, whether realty or personalty, in order to provide funds for payment of the duty, in the same manner "as they may be enabled by law to do for the payment of debts of the testator." As a condition precedent to any grant of probate or letters of administration, the Court having jurisdiction must require: (1.) payment of the whole amount of the duty, or (2.) the making by the applicant with surety or sureties of a bond such as is here in question. Such bond, however, is defeasible by due payment of the duty to which the property coming to the hands of the applicant or applicants may be found liable.

The Succession Duty Act contemplates that the obligor of the bond given to obtain probate may be a person who is not liable for the whole duty payable in respect of the estate, and this conclusion makes it proper to consider the possible position in respect of liability to duty of some of the classes of applicants who may properly claim probate or letters of administration. Where there is a will, then upon the death or renunciation of an executor, administration with the will

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annexed may be claimed by divers classes of parties having interest. Where there is intestacy, the classes of possible applicants are at least as numerous. Devisees and legatees may obviously be among the applicants.

The construction of the bond required under the statute should therefore, if the terms of the statute admit of it, be wide enough to render the statutory form applicable and its possible operation effective to secure the object of the Legislature—namely, the satisfaction of the claim of the Crown as a first charge upon the estate and every distributive share of it.

Counsel for the Crown properly pointed out that the construction of the bond for which the appellants contend would have the effect of enabling the executor in a case like the present to obtain a grant of probate without paying or securing to the Crown any sum whatever in respect of succession duty. This certainly was not the intention of the Legislature.

Upon consideration of the bond in the light of the statute, clear reasons appear for the use in the condition for defeasance of words comprehensive enough to secure that the applicant who makes a bond shall secure payment of the duty upon so much of the estate as comes to his hands by means of the will proved or the intestacy established in the particular case.

It was not conceded by counsel on the part of the Crown that in the circumstances of this case the real estate of the testatrix, such as in fact it was, which was devised to him had not come to the hands of Quagliotti as an executor, he being alike devisee and executor. This question does not need to be determined. It is enough to say that property of the testatrix could be said to come to her executor as executor whenever by virtue of the grant of probate he became able to exercise in respect of the realty any disposing power belonging to the legal personal representative.

Whether in this case the realty came to the hands of Quagliotti as executor is not the decisive question. Upon the true construction of the bond it must be held to have come to his hands in the fullest sense, that, namely, of ownership under the will; whereof by means of the bond he obtained probate; and

so to be property in respect of which succession duty must be paid before the condition of the bond can be held to have been performed.

Upon the questions whether before action brought the property devised to Quagliotti by the will had been found liable to succession duty so as to establish cause of action in the Crown and whether the amount of the duty had been duly ascertained, the true view of the case depends upon ss. 21 to 23; ss. 29 to 33 and s. 43 of the Act. Under s. 22 the Auditor-General was duly authorized by the Minister of Finance to determine, and did determine, the amount of succession duty on the property devised to Quagliotti, less a small deduction for medical and funeral expenses. It was contended for the appellant that this was not a determination binding upon Quagliotti and that in any view it could not bind the appellant corporation, his surety. The procedure under ss. 29 to 33 admittedly has no application, but s. 43 was relied upon for the appellants as conferring upon a judge of the Supreme Court authority upon motion or petition—in this case—to determine both liability and amount. The powers of s. 43 were not invoked at any material time, if a resort to them was at any time open, as of right, to Quagliotti or the appellants. The Auditor-General did, in fact, duly determine the amount of the duty upon the property in question, accepting the value which Quagliotti placed upon it. There is no valid ground for impugning the validity of the determination. Certainly the too sanguine estimate made by Quagliotti afforded no such ground. Some misapprehension arose at the trial as to whether the determination in question had been made after resort to the means provided by ss. 29 to 33, but this is immaterial, for the determination in fact made was made by agreement with Quagliotti. It is not open to challenge now by his guarantors.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Gard, Lyell, Betenson & Davidson.*

END OF VOL. AND OF APPELLATE SERIES FOR 1923.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1923, will be as follows :—

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2. —— *Appeal to Privy Council—Competence—Limits to Constitutional Powers —Commonwealth Conciliation and Arbitration Act*, 1904–1918—*State as Employer—Commonwealth of Australia Constitution Act*, 1900 (63 & 64 *Vict. c.* 12), *Constitution, s.* 74.
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2. —— *Alberta—Taxation of Railways—Exemption—Construction of Provincial Act—"Any statute"—Penalties—Limitation—"Party grieved"—Relief from Penalties—*3 *&* 4 *Will.* 4, *c.* 42, *s.* 3—*Alb. Stat.* 1909, *c.* 5, *s.* 10.
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3. —— *Fatal Accident—Action in Saskatchewan—Accident in British Columbia—Cause of Action—Fatal Accidents Act* (*R. S. Sask.*, 1909, *c.* 135), *s.* 2—*Workmen's Compensation Act* (*Stats. of B. C.*, 1916, *c.* 77), *s.* 11, *sub-s.* 1.
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4. —— *Fatal Accident—Dominion Railway—Breach of Order of Railway Board—Accident and Action in Manitoba—Cause of Action—Dominion and Provincial Acts—Incidental Conflict—Railway Act* (9 *&* 10 *Geo.* 5, *c.* 68, *Dom.*), *s.* 385—*Workmen's Compensation Act* (6 *Geo.* 5, *c.* 125, *Man.*), *s.* 13.
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5. —— *Legislative Power of Dominion—Emergency Legislation—Property and Civil Rights in Provinces—Control of Paper Supply and Prices—Canadian War Measures Act* (5 *Geo.* 5, *c.* 2, *Dom.*)—9 *&* 10 *Geo.* 5, *c.* 63, *Dom.*—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.
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6. —— *Negligence—Action in Saskatchewan—Negligence in Ontario—Common Employment—Cause of Action—Workmen's Compensation Act* (4 *Geo.* 5, *c.* 25, *Ont.*), *ss.* 13, 15.
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7. —— *Taxation—Demised Crown Lands—Taxation of Lessee's Interest—City of Montreal Charter* (62 *Vict. c.* 58, *Queb.*), *art.* 362*a*—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 125.
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8. —— (**BRITISH COLUMBIA**)—*Legislative Authority—Employment of Chinese and Japanese—Special Timber Licence—Japanese Treaty Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 27, *Dom.*)—*Oriental Orders in Council Validation Act*, 1921 (11 *Geo.* 5, *c.* 49, *B. C.*)—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *sub-s.* 25; *s.* 92, *sub-s.* 5; *s.* 109.
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9. —— —— *Mining Claims—Expiration of Free Miner's Certificate—Absence of equitable Title—Transfer of Mining Claims—Mineral Act* (*R. S. B. C.*, 1897, *c.* 134), *s.* 9.
Judgment of the Court of Appeal affirmed. ENGINEER MINING CO., LD. *v.* FRASER **J. C. 228**

10. —— —— *Shipping—Carriage by Water—Fire—Unseaworthiness—Cause of Loss—Onus of Proof—Water Carriage of Goods Act* (9 *&* 10 *Edw.* 7, *c.* 61), *ss.* 4, 7.
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11. —— —— *Succession Duty—Surety Bond—Property coming into the Hands of Executor—Property vesting in Executor as Devisee—Determination of Amount of Duty—Acceptance of Executor's Valuation—Succession Duty Act* (*R. S. B. C.*, 1911, *c.* 127), *ss.* 22, 24, 43.
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12. —— —— *Taxation—Income Tax—Supplementary Assessment—Taxpayers' Right to Discount—Taxation Act* (*R. S. B. C.*, 1911, *ch.* 222), *ss.* 10, 103.
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—— *Bradbury* v. *English Sewing Cotton Co., Ld.* [1922] 2 K. B. 569.
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—— *British India Steam Navigation Co.* v. *London War Risks Insurance Association*, [1919] 1 K. B. 632, 636, 637.
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—— *Cox* v. *Hakes* (1890) 15 App. Cas. 506.
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—— *Dawson* v. *Fitzgerald* (1876) 1 Ex. D. 257.
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—— *Hudson* v. *Camberwell Corporation* (1917) 86 L. J. (K. B.) 558.
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2. —— *Lease—Covenant against Underletting without Consent—Underletting of Part of Premises with Consent—Underletting of Remainder without Consent—Breach of Covenant—Forfeiture.*
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2. —— *Government Railways — Railway Shed used in Conjunction with Harbour Board—Charge for sorting Goods—Power of Railway Department—"In connection with a railway."—Government Railways Act,* 1908, *ss.* 2, 10.

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3. —— *Income Tax— Assessment—Deductible Expenditure—Brewery Company— Anti-prohibition Propaganda—Land and Income Tax Act,* 1916 (7 *Geo.* 5, *No.* 5), *s.* 86, *sub-s.* 1 (*a*).

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2. —— *Percentage Standard of Pre-War Profits— Ascertainment of Capital—Finance*

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3. —— *Excess Profits Duty—Port Authority — Capital — Pre-War Standard — Purchase of Dock Undertakings in Consideration of Issue of Port Stock—"Unpaid purchase money"—"Borrowed money"—"Debts"—Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68), *ss.* 3, 16, 18, 19, 20, 21—*Finance* (*No.* 2) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *Sch. IV., Part III., rr.* 1, 2, 3.

Decision of the Court of Appeal [1922] 2 K. B. 599 affirmed. INLAND REVENUE COMMISSIONERS *v.* PORT OF LONDON AUTHORITY - - - - **H. L. (E.) 507**

4. —— *Income Tax — Assessment on Railway Company in respect of Officers' Salaries—Salaries paid without Deduction of Income Tax—Basis of Assessment—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146, *Sch. E—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sch. E—Income Tax Act*, 1860 (23 *&* 24 *Vict. c.* 14), *s.* 6.

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5. —— —— *English Company holding Shares in American Company managed in United Kingdom — American Dividends taxed by Deduction — Transfer of Management to America—Claim by Revenue Authorities to treat American Dividends throughout as Profits from "foreign possessions"—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sch. D, Cases I. and V.—Finance Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 5—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch.* 1 *D, Cases I. and V.*

Decision of the Court of Appeal [1922] 2 K. B. 569 affirmed. BRADBURY *v.* ENGLISH SEWING COTTON CO., LD. - **H. L. (E.) 744**

6. —— —— *Office or Employment of Profit—Manager of Company—Commission on Profits—Whether assessable on Three Years' Average or on Receipts of Year of Assessment—"Perquisites"—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146, *Sch. E, rr.* 1 *and* 4—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sch. E.*

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2. —— *Contract—Breach—Rescission of Contract by New unenforceable Oral Agreement—Variation of Terms of Delivery—Repudiation.*

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2. —— *Charterparty — Construction — Demurrage — Exceptions — General Words followed by specific Words—Ejusdem generis Rule—Causes beyond Control of Charterers—Strike.*

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3. —— *Charterparty—Demurrage—Principal and Agent—Signature by Charterers "as agents"—Signatories described as "charterers" in Body of Charterparty—Personal Liability of Agents.*

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5. —— *Collision — Charterparty — Form T.* 99—*War or Marine Risk—Consequences of warlike Operations—Negligence in the Conduct of the warlike Operation.*

Decision of the Court of Appeal [1923] 1 K. B. 59 affirmed. ATT.-GEN. *v.* ADELAIDE STEAMSHIP CO., LD. - - **H. L. (E.) 292**

6. —— *Collision—Docks and Ports—Collision with Dock Gates—Dockowners' Rights of Detention—Statutory Powers of the Mersey Docks and Harbour Board—Limitation of Liability—Rateable Distribution—Priorities—Mersey Dock Acts Consolidation Act*, 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act*, 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3.

Decision of the Court of Appeal reversed. MERSEY DOCKS AND HARBOUR BOARD *v.* HAY **H. L. (E.) 345**

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5 Geo. 5, c. 2, Dom. (Canadian War Measures): FORT FRANCES PULP AND POWER CO. *v.* MANITOBA FREE PRESS CO. - - - **J. C. 695**

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6 Geo. 5, c. 125, Man. (Workmen's Compensation), s. 13: MCCOLL *v.* CANADIAN PACIFIC RY. CO.; ATT.-GEN. FOR MANITOBA, INTERVENER **J. C. 126**

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2. —— *Emergency Legislation — Ordinance applying Law of England—Sale of Goods—"Mercantile law"—Civil Law Ordinance No.* 111 (*Str. Sett. No. VIII. of* 1909), *s.* 5, *sub-s.* 1.
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Decision of the Court of Appeal affirmed. POSTMASTER-GENERAL *v.* LIVERPOOL CORPORATION - - - **H. L. (E.) 587**

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